CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1927

MRS. VIOLA BURGESS, ADMINISTRATRIX, v. NORTH CAROLINA ELECTRICAL POWER COMPANY.

(Filed 23 February, 1927.)

Master and Servant—Employer and Employee — Negligence — Duty of Master—Safe Instrumentalities—Inspection—Evidence—Nonsuit.

Where there is evidence that a lineman of an electric transmission, etc., company is required in the course of his employment to climb poles erected to support the overhead wires, by the use of steel spurs or "climbers" strapped to his feet which would probably slip on imperfect poles and cause him to fall to the ground to his injury, and the poles had been selected by the defendant or its agents, and under the foreman's requirements the lineman attempted to climb a defective pole, and fell and was fatally injured by reason of an improper pole, under the principle that the master is required by ordinary care to inspect the instrumentalities it provides in such instances, it is sufficient for the determination of the jury upon the issue of the defendant's actionable negligence, and without further evidence the questions of contributory negligence and assumption of risks do not arise.

APPEAL by defendant from *Schenck, J.*, at September Term, 1926, of BUNCOMBE. No error.

Action to recover damages for the wrongful death of plaintiff's intestate, who at the time of his death was engaged in the performance of his duties as a lineman, employed by defendant. His death was the result of injuries sustained by him when he fell from a pole, which he was climbing in order to do his work as a lineman.

The pole from which plaintiff's intestate fell had been recently installed in a new line which defendant was constructing for the transmission of electricity by means of wires strung on cross-arms placed near the top of the poles in said line. In order to perform his duties as a lineman, plaintiff's intestate was required to climb the poles and to work on the cross-arms. To enable him to climb the poles, he used, as defendant well knew, metal appliances, known as "climbers," which were strapped to his feet and legs; each "climber" contained a sharp spike, which when forced into the pole, supported him as he climbed the pole. If the pole was sound and firm, the spikes, as they were alternately forced into the pole, would hold, and support his weight, as he climbed toward the top of the pole; if it was not sound and firm, the spike upon which he rested his weight would not hold, but would tear loose, leaving him hanging on the pole, without support. In this situation there was great probability that he would fall to the ground, and thereby be injured.

Plaintiff alleges that the pole from which her intestate fell was defective in that at the time it was selected for use in defendant's line it was too soft to hold his spikes as he climbed it; that when he had climbed the pole a distance of 20 or 25 feet from the ground, the spike upon which he was supporting his weight tore loose from the pole, because the pole was too soft to hold it, thus causing him to fall and to sustain the injuries from which he died; that defendant knew or would have known, had it made a reasonable inspection at the time of its selection, that the pole was then defective in the respect which caused the spike to tear loose; that defendant was negligent in using this defective pole in its line, and that such negligence was the proximate cause of the fall, resulting in the fatal injuries.

Defendant denied that the pole was defective as alleged in the complaint, or that, if the pole was too soft, it was negligent in selecting and using the pole in its line; in defense of plaintiff's recovery defendant pleads contributory negligence and assumption of risk by plaintiff's intestate.

The issues submitted to the jury were answered as follows:

1. Was the plaintiff's intestate, John Harper Burgess, injured by the negligence of the defendant, the North Carolina Electrical Power Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate, John Harper Burgess, contribute to his injuries by his own negligence, as alleged in the answer? Answer: No.

3. Did the plaintiff's intestate, John Harper Burgess, assume the risk of being injured in the manner and way in which he was injured, as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff, Viola Burgess, administratrix, entitled to recover of the defendant, the North Carolina Electrical Power Company? Answer: $8,000.

From the judgment rendered upon this verdict, defendant appealed to the Supreme Court.

George M. Pritchard, McKinley Pritchard and Oscar Stanton for plaintiff.

Merrimon, Adams & Adams for defendant.

CONNOR, J. There was evidence tending to sustain the allegation in the complaint that the pole from which plaintiff's intestate fell, while engaged in the performance of his duties as a lineman, employed by defendant, was soft, and that this condition of the pole was the cause of his fall, resulting in injuries from which he died.

There was no evidence from which the jury could find that defendant knew, at the time the pole was selected for use in its line, or at the time plaintiff's intestate undertook to climb the pole, in the performance of his duties as a lineman, that the pole was defective in this respect. Want of knowledge, however, by an employer of a defect in an appliance or instrumentality furnished by him to be used by his employee, in the performance of his duties, does not necessarily relieve the employer of liability for damages resulting from injuries sustained by the employee, because of such defect. It is ordinarily the duty of the employer to make a reasonable inspection of the appliance or instrumentality, at least at the time of its selection, in order to determine whether or not it is free from defects discoverable by such inspection. A breach of this duty is negligence and if such breach results in damage, the negligence is actionable.

There was evidence from which the jury could find that defendant's foreman, who was in charge of the construction of the new line, and under whom plaintiff's intestate was at work, inspected the pole from which plaintiff's intestate fell, in order to ascertain whether or not it was a proper and suitable pole to be used in its line. Whether or not, upon all the evidence, such inspection as the jury might find was made by said foreman, was a reasonable inspection and a performance by defendant of its duty to plaintiff's intestate, to exercise reasonable care in the selection and use of said pole, was properly submitted to the jury, unless upon the facts of this case defendant owed no duty to plaintiff's intestate to make an inspection of the pole, at the time of its selection for use in the line, in the construction of which plaintiff's intestate was employed as a lineman.

Upon its motion, at the close of all the evidence, for judgment dismissing the action as upon nonsuit (C. S., 567), defendant contended that it owed no duty to plaintiff's intestate, an experienced lineman in its employment, to inspect the pole, either at the time said intestate undertook to climb the pole, or at the time it was selected for use in its line, in order that it might discover whether or not the pole was too soft to hold his climbers. It contends that because of the peculiar duties which a lineman undertakes to perform for his employer the duty of inspecting poles which he is required to climb, and upon which he is required to work, is imposed by law upon the lineman and not upon his employer.

A similar contention made by the defendant in *Terrell v. Washington*, 158 N. C., 282, was not sustained by this Court. Plaintiff in that case was a lineman; while he was at work as an employee of defendant, near the top of a pole, supporting himself by a belt around his body, fastened to the pole, and by spikes strapped to his feet, and driven into the pole, the pole fell to the ground, causing him serious injuries. There was evidence tending to show that the pole was rotten and in very bad condition several inches under the ground, and that it broke 3 or 4 inches below the surface of the ground. The pole had been standing three years. There was evidence also tending to show that the pole was not sound or strong at the time it was selected for use by defendant, and that this fact could have been discovered by ordinary inspection. Defendant contended that the duty of inspection rested upon plaintiff, a lineman, and not upon defendant, his employer. Referring to authorities cited by defendant's counsel in support of this contention, it is said in the opinion of the Court by *Walker, J.*, "We believe that they all hold that this principle does not apply if the pole was originally unsound and unfit for use, and that it is the duty of a telegraph, or telephone, or electric light company, when it selects a pole for use in its line, to inspect it for the purpose of ascertaining if it is sound and fit." In the Case Note to be found in 21 L. R. A. (N. S.), 774, it is said: "The great weight of authority supports conclusion reached in the above case (*Lynch v. Traction Co.*, 153 Mich., 174, 116 N. W., 983), that an experienced lineman assumes the risk of the breaking of any pole he is called upon to climb in the course of his employment, if the defect which caused the pole to break was not of original construction, and that therefore his employer owes him no duty to inspect the pole before sending him upon it." See cases cited.

The evidence in the instant case tended to show that the defect in the pole which caused plaintiff's intestate to fall existed at the time the pole was selected by defendant's foreman for use in the line in process of construction, and that it could have been discovered by an ordinary inspection. The foreman selected the pole, and directed plaintiff's intestate and other employees of defendant to use the pole. Before selecting said pole it was the duty of defendant's foreman to make a reasonable inspection of the pole, having in mind that linemen in the employment of defendant would be required to climb the pole after it was installed by using spikes strapped to their feet. The failure to make such inspection, if found by the jury, was negligence, and defendant is liable for damages resulting from such negligence. It cannot be held, upon all the evidence, as a matter of law, that plaintiff's intestate by his own negligence contributed to his injuries, or by his contract of employment assumed the risk of such injuries. Issues involving these defenses were properly submitted to the jury.

There was no error in overruling the motion for judgment dismissing the action as in case of nonsuit. Defendant's assignment of error based upon its exception to the ruling upon said motion is not sustained.

Other assignments of error based upon exceptions to the admission or exclusion of testimony as evidence, and upon exceptions to instructions in the charge to the jury have been carefully considered; they cannot be sustained. The judgment is affirmed. We find

No error.

MILES MUSE v. THOMAS H. HATHAWAY ET AL.

(Filed 23 February, 1927.)

1. **Limitation of Actions—Deeds and Conveyances—Reformation—Equity—Fraud—Mistake—Statutes.**

While a deed reserving a life estate in the grantors may be reformed for fraud, mutual mistake, etc., so as to show that in fact it was a mortgage with the defeasance clause omitted, and permit those claiming title under the mortgagor after his death to have an accounting in proper instances, they must do so within three years from the discovery of the fraud, etc., or when they should reasonably have discovered it, during the continuance of the life estate or thereafter, under the provisions of C. S., 441(9) and 437(4).

2. **Reformation of Instruments—Equity—Burden of Proof.**

The burden of proof is on the party seeking to reform a deed absolute upon its face into a mortgage.

3. **Same—Deeds and Conveyances—Evidence.**

It is necessary for a party seeking to reform a deed absolute upon its face into a mortgage to show facts and circumstances dehors the deed inconsistent with its terms as to entitle him to the relief sought for.

APPEAL by plaintiff from *Nunn, J.*, at September Term, 1926, of CHOWAN.

The verdict was as follows:

1. Is defendant's action barred by the statute of limitations as alleged in plaintiff's reply? Answer: No.

2. Was the deed of John and Rebecca Hathaway to Miles Muse, dated 22 August, 1918, intended to operate as a mortgage and the clause of defeasance omitted from said deed through mutual mistake of parties or mistake of grantors induced by fraud of said Muse as alleged in the answer of defendants? Answer: Yes:

Judgment for the defendants. Exception and appeal by the plaintiff.

W. D. Pruden for plaintiff.

H. R. Leary and Ehringhaus & Hall for defendant.

ADAMS, J. On 22 August, 1918, John Hathaway and Rebecca, his wife, who were seized by entireties of the land in controversy, executed and delivered to the plaintiff a written instrument purporting to be a deed therefor, expressly reserving to themselves an estate for life. The paper was registered the next day. John died in November, 1918, leaving his surviving widow the sole owner of the reserved estate, and she died on 21 April, 1925. *Davis v. Bass,* 188 N. C., 200.

After the death of Rebecca and the consequent termination of the life estate, that is, on 2 June, 1925, the plaintiff instituted this action against the defendants, who are Rebecca's heirs at law, to recover possession of the land; and they resisted recovery upon the ground that the instrument, though executed in the form of a deed, was intended as a security for debt, or a mortgage, and that the clause of defeasance had been omitted by the mutual mistake of the parties, or by the inadvertence of the draftsman, or by the mistake of the grantors induced by the fraud of the plaintiff. They prayed that the paper be reformed, that an accounting be had, and that they be permitted to redeem.

The plaintiff filed a reply, alleging that the grantors and the defendants knew that the paper was intended as a deed, and had knowledge of its contents and of the circumstances under which it was executed; and that in any event, if its execution was subject to impeachment as alleged, they knew or should have known of the fraud or mistake for more than three years preceding the commencement of the action, and that their cross-action for reformation is barred by the statute of limitations.

With respect to the bar of the statute two questions are to be considered: (1) Whether an action to reform a deed and to convert it into a mortgage by engrafting a clause of defeasance which has been omitted by mutual mistake or by fraud and mistake is barred in ten or in three years, and (2) whether, if the three-year statute applies, there was error in the instructions given the jury.

The defendants say that the deed in question was intended by the parties to be effective as a mortgage; that the redemption of the mortgage is the main relief which they seek; that reformation of the deed is incidental, and that their cause of action is not barred within ten years. C. S., 437(4). They cite *Pritchard v. Williams,* 175 N. C., 319, as authority for their position; but there is an obvious distinction between that case and this. There the doctrine discussed is whether the right of a remainderman to have a parol trust in land declared during the existence of the life interest is inconsistent with his right to bring suit after the falling in of the life estate to declare the trust and to recover possession of the land; and it was held that a remainderman's right to equitable relief whenever necessary to protect his interest against loss or injury is in the nature of a bill to perpetuate testimony with the additional element of a declaration of trust; that the two rights are not inconsistent, and that as the plaintiffs had brought their action within the prescribed period after the termination of the life estate their cause was not barred. There is no suggestion that their right to have the trust declared during the continuance of the life interest would have been barred by any statute not applicable to the main relief, which was the recovery of the land as well as the declaration of a trust.

In the case before us the circumstances are entirely different. If the deed was a mortgage in fact and in law, it was subject to be redeemed at any time within ten years; but an action for relief on the ground of fraud or mistake must be brought within three years from the time the cause accrues, the words "relief on the ground of fraud" having a meaning broader than that which is denoted in ordinary actions at law for fraud and deceit. C. S., 441(9); *Little v. Bank,* 187 N. C., 1. There can be no doubt that the language of the statute is sufficiently comprehensive to include the "mutual mistake" or the "fraud and mistake" alleged as a basis of the prayer for reformation; and the principle controlling upon this theory is enounced in the case last cited. The plaintiff in that action sought to impress a trust upon certain property conveyed to the defendant's intestate for the reason that the execution of the conveyance had been procured by fraud; and in the opinion it was said that the alleged right to impress the trust (which would be barred in ten years) was dependent upon the validity or invalidity of the deed made by the plaintiff (which must be determined in three years); and if the right to assail the deed was barred, all claims to the proceeds in possession and control of the grantee or his successors were likewise barred. *Little v. Bank, supra.*

We cannot accede to the defendants' contention that the reformation of the deed for fraud or mistake is merely incidental to the redemption of the mortgage. Mutual mistake or mistake induced by fraud is essential to the correction of the deed; it is the vital element. Unless the deed is reformed by inserting the omitted clause of defeasance it remains a deed; it can be reformed only by establishing mutual mistake or fraud and mistake; and an action for either of these causes must be prosecuted within three years after accrual. To say that reforming the deed is only an incident in the process of redeeming the mortgage is equivalent to saying that contrary to the statute relief on the ground of fraud or mistake may be had at any time during the ten-year period allowed for the redemption of the mortgage.

The next question is whether there was error in the instruction given the jury in reference to the three-year statute of limitations. If it be granted that reserving a life estate to the makers of the deed is not inconsistent with the notion or conception of a mortgage, still if the makers knew that the mutual intent was to execute a mortgage the reserved estate did not preclude them, or the survivor, from seeking relief in a court of equity. The life interest did not prevent the statute from running. In view of this principle, the plaintiff excepted to the following instruction: "The burden is upon the defendants to satisfy you from the evidence and its greater weight that their cross-action was commenced within three years from the time of the alleged discovery by them of the alleged mutual mistake or fraud, or within three years from the time they, by the exercise of ordinary diligence, should have discovered such mutual mistake or fraud. If the defendants have so satisfied you from the evidence you should answer the first issue 'No'; if the defendants have failed to so satisfy you from the evidence, you should answer the first issue 'Yes.' "

In effect, this is an instruction that the statute did not run against Rebecca, the surviving grantor and sole owner of the alleged equity of redemption. But there is evidence tending to show that Jackson Rumble, "acting for Rebecca," tried to get the property back three or four days after John Hathaway's death; and the plaintiff requested an instruction that the statute would run against her. Certainly, if Rebecca was barred, the defendants also were barred; but the jury was not permitted to consider this phase of the evidence.

We cannot say there was no evidence to support the cross-action, and for this reason the plaintiff's motion for nonsuit must be denied; but we call attention to the principle that in order to reform a deed and convert it into a mortgage the intention of the parties must be established, not merely by proof of declarations, but by proof of facts and circumstances dehors the deed inconsistent with an absolute purchase. *Streator v. Jones,* 10 N. C., 423; *Kelly v. Bryan,* 41 N. C., 283; *Sowell v. Barrett,* 45 N. C., 50; *Crawford v. Willoughby,* 192 N. C., 269.

New trial.

AMERICAN NATIONAL BANK v. J. G. BRICKHOUSE AND E. P. COHOON.

(Filed 23 February, 1927.)

1. Evidence—Letters—Proof Required—Primary and Secondary Evidence.

Letters offered as evidence upon matters directly relating to questions in controversy and not collateral thereto, must be sufficiently identified as genuine, and where the letter itself is not produced, its absence or loss must be sufficiently accounted for to admit evidence of its contents.

2. Same—Hearsay—Bills and Notes—Negotiable Instruments—Notice of Infirmity of Instrument.

Where a bank claims a negotiable instrument as holder in due course for value, without notice of its infirmity, a letter purporting to have been written by the president of the bank showing notice of the infirmity alleged in defense of its action thereon, is incompetent as hearsay in the absence of evidence of its genuineness.

CIVIL ACTION, tried before *Nunn, J.*, at November Term, 1926, of TYRRELL.

The evidence disclosed that on 11 November, 1920, the defendant Brickhouse executed his promissory note for $750, payable "to the order of myself, . . . value received and without offset," and said note was duly endorsed by said defendant Brickhouse on the back thereof. On 11 November, 1920, the defendant Cohoon executed a promissory note for $500, payable "to the order of myself, . . . value received and without offset," and on the same date said defendant Cohoon issued his promissory note for $750 in the same language as the note above referred to and duly endorsed the same on the back thereof. All of these notes were delivered to the Phos-Pho Germ Manufacturing Corporation in payment of purchase price for certain stock of said corporation. These notes were taken by the Phos-Pho Germ Corporation to the plaintiff American National Bank, and hypothecated with the plaintiff as collateral security for a line of credit advanced by plaintiff to the Phos-Pho Germ Manufacturing Corporation. The Phos-Pho Germ Manufacturing Corporation had become insolvent and the plaintiff contends that there is $7,264.64 due by the Phos-Pho Germ Manufacturing Corporation to it upon the line of credit for which the notes in controversy were pledged as security.

The evidence of defendants tended to show that the notes were secured by means of fraud and fraudulent representation made by the agents of the Phos-Pho Germ Manufacturing Corporation in a stock-selling scheme, and that said notes were executed and delivered by the defendants to the agent of the Phos-Pho Germ Manufacturing Corporation for the purchase price of stock in said corporation. That at the time said notes were issued by the defendants, the agent of the Phos-Pho

Germ Manufacturing Corporation represented that said company was a going concern, had paid large dividends, and the company had a large quantity of fertilizer on hand, and that they had factories in Richmond and a large quantity of manufactured fertilizer ready for shipment at New Bern. That all of these representations were false, and that the defendants relied upon said representations.

The defendants further allege that Phos-Pho Germ Manufacturing Corporation had not complied with the Blue-Sky Law and that Mr. O. J. Sands, president of the plaintiff bank, was director in the Phos-Pho Germ Manufacturing Corporation, and that the plaintiff bank was not the purchaser of said notes in due course and without notice.

The issues and answers of the jury thereto were as follows:

1. Did defendants execute the notes sued on in this action, as alleged in the complaint? Answer: Yes.

2. Were defendants induced to execute said notes by fraud and misrepresentation on the part of Phos-Pho Germ Company, as alleged by defendants? Answer: Yes.

3. Did plaintiff American National Bank take said notes for value before their maturity and without knowledge of such fraud, as alleged? Answer: No.

4. What amount is due on the J. G. Brickhouse notes? Answer: Nothing.

5. What amount is due on the E. P. Cohoon notes? Answer: Nothing.

From the judgment upon the verdict plaintiff appealed.

W. L. Whitley for plaintiff.
Thompson & Wilson for defendant.

BROGDEN, J. Exceptions eight and twelve present this question: Can a witness testify as to the contents of a letter received by him without proof of the genuineness of the original letter and without evidence as to the loss thereof?

It is a general rule of evidence that the best evidence which the nature of the case admits of must be produced. When the nonproduction of the best evidence is properly accounted for, then the next best evidence in the party's power is required. But before secondary evidence of the contents of a letter can be given in evidence, the letter itself must be properly identified by proof of the signature, and if the letter has been lost, the loss must be properly shown before evidence of the contents thereof is admissible. *Dumas v. Powell,* 14 N. C., 104; *Smith v. R. R.,* 68 N. C., 107; *Gillis v. R. R.,* 108 N. C., 441; *Avery v. Stewart,* 134 N. C., 287; *Arndt v. Ins. Co.,* 176 N. C., 652; *Mahoney v. Osborne,* 189 N. C., 445.

In the case now under consideration, the record shows the following facts: The defendant Cohoon testified that the agent of the Phos-Pho Germ Manufacturing Corporation "had a letter from Mr. Sands, signed by Mr. Sands. (Question by the court): All you know is that it purported to be from Mr. Sands? Answer: Yes, sir; and written on a letterhead, written by Mr. Sands, president of the bank. (By the court): Did his name appear on the printed stationery? Answer: Yes, sir. With a great many of the other bank associates? Answer: He told me that some other concern which did a big trunk and box business, who were stockholders in this business, and had a letter from them, saying what a success it was, and what a wonderful investment it was, and what a wonderful product they had, surpassing all other fertilizers in making crop yields." In the charge to the jury the court referred to the letter as follows: "And that he showed him, or offered evidence to show, that he is also an officer in the Phos-Pho Germ Manufacturing Corporation."

The witness did not testify that he knew the handwriting of Mr. Sands, and there was no evidence whatever to identify the letter. Without such proof the letter was inadmissible. Even if the letter had been genuine and properly identified and proven, the best evidence of its contents would have been the letter itself, and certainly, in the absence of evidence that the letter had been lost or misplaced by the witness, the contents thereof were inadmissible. Then, too, the contents of letters would have been clearly incompetent as hearsay. *Arndt v. Ins. Co.*, 176 N. C., 652; *Mahoney v. Osborne, supra; Bixler v. Britton,* 192 N. C., 199.

These letters related to matters in issue and were not collateral to the question in controversy.

There are other exceptions in the record, but, as a new trial must be awarded for the error specified, it is therefore unnecessary to discuss these exceptions.

New trial.

COMMERCIAL INVESTMENT TRUST, INC., v. FRANK GAINES AND DAVID GAINES, JOHN P. BISHOP, REX F. BISHOP AND JOHN F. FULTON, TRADING AS THE MOTOR COMPANY.

(Filed 23 February, 1927.)

Actions—Foreign Corporations—Statutes—Doing Business in This State —Principal and Agent—Evidence.

Evidence that a nonresident defendant corporation engaged in the business of purchasing in its state of residence lien notes from automobile dealers in this State taken by the latter from purchasers of automobiles,

is not alone sufficient to bring it within the intent and meaning of C. S., 1181, requiring as a prerequisite to doing business here the filing of a copy of its charter, etc.

APPEAL by defendants from judgment of Superior Court of GUILFORD, at April Term, 1926, before *Shaw, J.* No error.

Action to recover amount due on note executed by defendants Frank Gaines and David Gaines, payable to their codefendants, trading as The Motor Company, or order. Plaintiff, a corporation organized under the laws of the State of New York, is now the holder of said note. Payment of said note was guaranteed in writing by defendants John P. Bishop, Rex F. Bishop, and John F. Fulton, as individuals, prior to the purchase of the note by plaintiff.

Defendants deny liability on said note; they contend that plaintiff, a foreign corporation, having failed to comply with statutes relative to foreign corporations doing business in this State, cannot maintain this action. David Gaines having died since the commencement of the action, plaintiff submitted to a nonsuit as to him.

The issue submitted to the jury was answered as follows:

"Are the defendants indebted to plaintiff, and if so, in what amount? Answer: Yes; $198.04, with interest from 30 September, 1924."

From judgment upon this verdict, defendants appealed to the Supreme Court.

Shuping & Hampton for plaintiff.
H. R. Stanley for defendants.

CONNOR, J. Plaintiff is a corporation, organized under the laws of the State of New York, with its principal office and place of business in said state. Defendants are citizens and residents of the State of North Carolina.

On 30 August, 1924, defendants Frank Gaines and David Gaines, at Greensboro, N. C., executed their promissory note, negotiable in form, by which they promised to pay to The Motor Company, or order, the sum of $245.04, in accordance with the terms set out therein. The Motor Company is a partnership, engaged in business as a dealer in automobiles at Greensboro, N. C., and composed of defendants John P. Bishop, Rex F. Bishop, and John F. Fulton. The consideration of said note was the balance due on the purchase price of an automobile sold by The Motor Company to the makers of said note.

Plaintiff purchased the said note from The Motor Company, in due course of business. Prior to said purchase, John P. Bishop, Rex F. Bishop, and John F. Fulton, in writing, guaranteed its payment. Certain payments, made on said note, have been duly credited; the balance due, at the commencement of this action, was $198.04.

With respect to defendant's contention that plaintiff, a foreign corporation, could not maintain the action for that it had not complied with the provisions of C. S., 1181, and therefore under the provisions of subsection 16, section 82, ch. 34, Public Laws 1921, the transaction upon which plaintiff relies for its right of action, is wholly void, the court instructed the jury as follows:

"There is an interesting question of law in this case, gentlemen, but after considering the argument of counsel and hearing the authorities read, the court is of the opinion that there is not sufficient evidence to go to the jury that plaintiffs engaged in business in North Carolina."

Defendants excepted to this instruction, and assign same as error.

It has been generally held that a foreign corporation cannot be held to be doing business in a state, and therefore subject to its laws, unless it shall be found as a fact that such corporation has entered the state in which it is alleged to be doing business, and there transacted, by its officers, agents, or other persons authorized to act for it, the business in which it is authorized to engage by the state under whose laws it was created and organized. The presence within the state of such officers, agents, or other persons, engaged in the transaction of the corporation's business with citizens of the state, is generally held as determinative of the question as to whether the corporation is doing business in the state. *Timber Co. v. Ins. Co.,* 192 N. C., 57, 133 S. E., 424; *R. R. v. Cobb,* 190 N. C., 375; *Lunceford v. Association,* 190 N. C., 314.

"The general rule is that when a foreign corporation transacts some substantial part of its ordinary business in a state, it is doing, transacting, carrying on, or engaging in business therein, within the meaning of the statutes under consideration." 14a C. J., p. 1270, sec. 3977.

The evidence in the instant case tends to show that plaintiff is engaged in the business of purchasing notes, executed by purchasers of automobiles, in part payment of the purchase of, and secured by liens or chattel mortgages on the automobile purchased; that these notes are purchased from dealers, residing and doing business in states other than New York; that the notes offered for sale by said dealers are sent to plaintiff in New York, and there purchased or rejected as plaintiff may determine in each instance; that said notes are payable in New York, at the offices of plaintiff.

There is no evidence that any officer, agent or other person has purchased such note in the State of North Carolina, or has ever come into said State for the purpose of purchasing such notes. There was evidence that plaintiff has purchased many notes from dealers, residing and doing business in North Carolina, all such notes, however, having been purchased in New York; there was also evidence that plaintiff has brought suits to recover upon notes not paid by the makers at maturity, and in some instances to recover possession of the automobile upon which there was a lien for the note.

It is well settled that the bringing of actions by a corporation created and organized under the laws of one state, in the courts of another state, to enforce collection of debts alleged to be due to such corporation from citizens and residents of the latter state, or the engaging in litigation with citizens and residents of such state, in its courts, does not constitute "doing business" in said state, within the meaning of statutes similar to that invoked by defendants in support of their contention that plaintiff, a foreign corporation, cannot maintain this action, because it is doing business in this State, without having complied with the provisions of C. S., 1181, 14a C. J., p. 1276, sec. 3983.

We concur in the opinion of the learned judge who presided at the trial of this action in the Superior Court, that there was no evidence from which the jury could find that plaintiff was doing business in this State.

The provision contained in subsection 16, section 82, ch. 34, Public Laws 1921, which also appears in subsection 15, section 89, ch. 4, Public Laws 1923, does not apply to the plaintiff in this action for the reason that although plaintiff, a nonresident corporation, has not complied with C. S., 1181, it is not doing business in this State. It may be noted that said provision does not appear in subsection 15, section 89, ch. 101, Public Laws 1925. The General Assembly has eliminated this provision from the statute entitled "An act to raise revenue." We do not therefore consider the many interesting questions discussed in the briefs filed in this Court. They are not material to the disposition of this appeal, and need not be discussed or decided. The assignment of error relied upon by appellants cannot be sustained. The judgment is affirmed. There is

No error.

STATE v. JOHN COLSON.

(Filed 23 February, 1927.)

1. **Evidence—Witnesses—Character—Criminal Law—Instructions — Appeal and Error.**

   Upon a trial for violating the prohibition law, the defendant does not place his own character in evidence as to the particular offense charged against him merely by taking the witness stand, and a charge of the court that a bad reputation of this kind if so found by the jury could be considered as corroborative evidence of the State's witnesses, is reversible error to the defendant's prejudice.

2. Same—Qualification—Cross-Examination.

Before evidence as to the character or general reputation of a party is admissible, the witness should first testify as to his knowledge; and if upon direct examination he testifies in the affirmative, the following questions should be directed to general character, permitting the witness to specify; and on cross-examination questions as to particular matters may be asked and the answer of the witness is not subject to contradiction.

APPEAL by defendant from *Nunn, J.*, at November Term, 1926, of PERQUIMANS.

Criminal prosecution, tried upon indictment charging the defendant with purchasing, selling, and transporting intoxicating liquors, etc., in violation of law.

The principal evidence offered by the State was the testimony of one J. H. Metts, a detective, who operated under the name of J. J. Bell. He testified that in April, 1926, he went to the home of the defendant and, by falsely representing his business, purchased a gallon of whiskey from him in the presence of the defendant's wife and small son, Bruce. The witness further testified that on the following day he returned to the home of the defendant and bought four quarts of liquor from the defendant's wife and son, the defendant himself not being present at this time. These purchases were deposited with J. W. Darden, a justice of the peace, and request made that a warrant be issued for the defendant.

The evidence of the State's witness was denied in all its essential features by the defendant, his wife and their son.

In rebuttal, and over objection, the State offered evidence tending to show that the defendant's general reputation was bad "for dealing in liquor."

With respect to this evidence, the following excerpt, taken from the court's charge, forms the basis of one of the defendant's exceptive assignments of error:

"The court instructs you that you should not convict the defendant on his reputation for selling liquor, if you should find from the evidence that he has such a general reputation, but evidence of the defendant's general reputation is competent to be considered by you in this case, as he has testified in his own behalf, and evidence of his general reputation for selling liquor, or violating the prohibition law, is competent as a circumstance tending to corroborate the testimony of Mr. Metts that he found intoxicating liquor at the home of the defendant, and purchased liquor from the defendant. The evidence of defendant's reputation for selling or possessing or transporting liquor is allowed to go to you for the purpose of corroborating Metts, and the whiskey which has been offered in evidence is admitted for the purpose of corroborating Mr. Metts and Judge Darden, if you find it corroborates them, and such evidence is admitted for the purpose of corroboration only, and not as substantive evidence."

From an adverse verdict and judgment of twelve months on the roads, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Aydlett & Simpson for defendant.

STACY, C. J., after stating the case: The court's instruction that the evidence tending to impeach the general reputation and character of the defendant was to be considered by the jury as corroborative of the testimony of the State's witness, J. H. Metts, and only as such, is not in accord with precedent. It is contended, however, that a new trial should not be awarded for this deviation from the usual formula, because, it is said, to assail the credibility of the defendant's testimony, by showing him to be a man of bad character, is, in effect, but to strengthen or to corroborate the testimony of the State's witness. We are unable to take this view of the matter. Suppose the jury were inclined to disbelieve the defendant's testimony, because of the evidence tending to impeach his general reputation and character, but were not willing to accept the evidence of the State's witness without corroboration—a position not at all improbable—would not a verdict of acquittal be the result, the State not having established the guilt of the defendant beyond a reasonable doubt? To ask this question suggests an answer in the affirmative. We cannot say the error was harmless; its natural effect would seem to be otherwise.

In all criminal prosecutions, certainly those involving moral turpitude, the defendant may elect to put his character in issue, and thus produce evidence of his good reputation and standing in the community (*S. v. Hice,* 117 N. C., 782); but if this be not done, the State cannot offer evidence of his bad character, unless and until he has been examined as a witness in his own behalf, and even then—the defendant not electing to put his character in issue—the impeaching testimony is permitted to affect only his credibility as a witness, and not the question of his guilt or innocence. *Marcom v. Adams,* 122 N. C., 222; *S. v. Traylor,* 121 N. C., 674. Of course, in proper instances, in criminal cases, where the defendant chooses to put his character in issue, the pertinent evidence, pro and con, then becomes substantive proof, and may be considered by the jury as such. *S. v. Morse,* 171 N. C., 777; *S. v. Cloninger,* 149 N. C., 567; *In re McKay,* 183 N. C., 226.

Here, the defendant offered no evidence of his good character, though he did testify in his own behalf. Evidence of his bad character, therefore, was competent only for the purpose of impeaching the credibility of his testimony. *S. v. Cloninger,* 149 N. C., 571; *S. v. Atwood,* 176 N. C., 704; *S. v. Moore,* 185 N. C., 637; *S. v. Love,* 189 N. C., 766.

There are other exceptions directed to the admission of evidence tending to impeach the general reputation and character of the defendant on the ground that the witnesses had failed to qualify as competent witnesses before testifying on the subject, but as these exceptions are not likely to be taken on another hearing, we shall not pass upon them now.

The rule is that where an impeaching or sustaining character witness is called, he must first qualify himself by saying whether he knows the general reputation or character of the witness or party about which he proposes to testify. If he answer that he does not, he should be stood aside without being cross-examined on the subject. And if he reply in the affirmative, he should be confined to general reputation or character. *S. v. Parks,* 25 N. C., 296.

Speaking to the question in *Edwards v. Price,* 162 N. C., 244, *Clark, C. J.,* delivering the opinion of the Court, said: "The rule as to this matter has been fully settled by many decisions in this Court. It is this: The party himself, when he goes upon the witness stand, can be asked questions as to particular acts, impeaching his character, but as to other witnesses it is only competent to ask the witness if he 'knows the general character of the party.' If he answers 'No,' he must be stood aside. If he answers 'Yes,' then the witness can, of his own accord, qualify his testimony as to what extent the character of the party attacked is good or bad. The other side, on cross-examination, can ask as to the general character of the party for particular vices or virtues. But it is not permissible either to show distinct acts of a collateral nature nor a general reputation for having committed such specified act. McKelway Ev., secs. 123, 125; 1 Gr. Ev., sec. 461-b. To permit this would protract trials to an indefinite extent by permitting the investigation of numerous incidents, if not indeed the whole life of the party, and would distract the attention of the jury from the real points at issue in the case and turn the trial into an investigation of the character of the party. It is important to confine the rule strictly as above stated, both to concentrate the attention of the jury upon the matters in issue and to avoid unnecessary length of trials." See, also, *S. v. Mills,* 184 N. C., 695; *S. v. Haywood,* 182 N. C., 815; *S. v. Killian,* 173 N. C., 796; *Tillotson v. Currin,* 176 N. C., 484; *S. v. Robertson,* 166 N. C., 356; *S. v. Holly,* 155 N. C., 485; *S. v. Ussery,* 118 N. C., 1177; *S. v. Coley,* 114 N. C., 879, and *S. v. Gee,* 92 N. C., 760.

For the error, as indicated, in misdirecting the jury as to how they should consider the evidence tending to impeach the general reputation and character of the defendant, a new trial must be awarded; and it is so ordered.

New trial.

W. H. WHITLEY, CHARLES SPRUILL AND CHARLES A. FLYNN v. THE CITY OF WASHINGTON, NORTH CAROLINA, AND J. R. MEEKINS, CITY CLERK OF WASHINGTON, NORTH CAROLINA.

(Filed 23 February, 1927.)

Taxation—Schools—Back Taxes—Statutes—Constitutional Law.

A city without legislative authority may not levy a back tax to reimburse itself for moneys it has paid on the interest of its bonded debt, on a part of the district that has escaped taxation by reason of inadvertence or error of the proper authorities in listing the property of the owners for that purpose, and an ordinance to that effect is void as inhibited by the State Constitution and statute requiring that taxes shall be uniform and *ad valorem.* Const., Art. VII, sec. 9; C. S., 2678.

APPEAL by defendants from *Nunn, J.,* at December Term, 1926, of BEAUFORT. Affirmed.

Controversy without action. Main facts:

The Washington Public School District embraces the city of Washington, N. C., and also a considerable territory outside of said city, and said city is authorized by law to levy the taxes for said public school district. In 1922 bonds were issued for said school district in the amount of $300,000, and in 1923-24-25, a tax was levied for the purpose of paying the interest on these bonds, but said tax was levied only on the property inside the corporate limits of the city of Washington, and was not levied on the property outside the city of Washington, nor has any tax ever been collected on said property for the purpose of paying the interest on the bonds, the result being that the property inside the corporate limits of the city of Washington has borne the expense of this interest, and that the property outside has never contributed its pro rata share for this purpose. This error was discovered and the taxing authorities of the city of Washington, N. C., are now attempting to levy for the year 1926-27 a tax on the property outside of the city of Washington to reimburse the city of the tax which it has paid on behalf of the outside landowners.

At a meeting of the board of aldermen on 8 September, 1926, a tax levy was made covering all of the property within the entire boundaries of the Washington Public School District of 35 cents for maintenance and operation and 21 cents for school bond interest.

On 7 October, 1926, the city of Washington, N. C., adopted a resolution levying a tax on the part of Washington Public School District outside of the corporate limits of said city for maintenance and operation of schools, .35 cents, and for bond interest for 1923-26, 66⅔; total, $1.01⅔.

The following resolution was duly adopted by them:

"Whereas the auditors, when making the regular annual audit of the books, accounts, and records of the city of Washington, discovered that the school district outside of the corporate limits of the city of Washington had not been paying its pro rata portion of the school bond interest since the bonds were issued on 1 January, 1923; and

"Whereas the taxpayers of the city of Washington have been paying the interest on these bonds since the bonds were issued; and

"Whereas the rate of taxation necessary to cover this charge against the district is 16⅔ cents per year, and the total amount chargeable against the district as a whole is $15,000 per year, $1,666.67 is chargeable against that portion outside the corporate limits; and

"Whereas the district outside the corporate limits has never paid any portion of said interest, and is, therefore, chargeable with three years interest, or $5,000.01, for the years 1923, 1924, and 1925, or 50 cents per $100 valuation. This, with the charge of 16⅔ cents per $100 for the current year's interest, makes it imperative to levy a tax of 66⅔ cents per $100 valuation for bond interest on all property outside the corporate limits subject to school tax for the Washington Public Schools: Therefore, the rate of taxation for that part of the Washington Public School District outside the corporate limits of the city of Washington for the year will be as follows:

Maintenance and operation	$0.35
Bond interest, 1923-1926, both inclusive	.66⅔
Total	$1.01⅔

"Now, therefore, be it resolved by the board of aldermen of the city of Washington, State of North Carolina, that there shall be levied and collected on all property, both real and personal, in said district outside the corporate limits of the said city, a tax of 66⅔ cents per $100 valuation, for the purpose of paying the bond interest for the current year, and to reimburse the city of Washington for that portion of bond interest paid by the said city, which was properly chargeable against the said district outside the corporate limits as hereinbefore set out."

In the case agreed, it was admitted that plaintiffs owned real estate outside of the city of Washington, but inside the public school district, and that two of them bought their property in 1926, and the other has owned his for three years. The property was duly listed for taxes.

The following judgment was rendered in the court below:

"It is considered, ordered, adjudged, and decreed, . . . that the taxes levied by the board of aldermen of the city of Washington, on 7 October, 1926, amounting to $1.01⅔, on property within the Washington School District, but applying only to property in said district outside of the city of Washington, were wrongfully and illegally levied and assessed on said property outside of the corporate limits of the city of Washington; said rate of taxation being upon a different basis from that levied upon property in the city of Washington, and inside of the said school district for the year 1926; the court being of the opinion that all taxes levied must be equal, uniform, and *ad valorem,* applying equally to all property within the taxed area. It is, therefore, considered, ordered, and adjudged that said levy of the city of Washington of 7 October, 1926, as set out in a resolution made a part of the case submitted, is illegal and void, and the said city and J. R. Meekins, city clerk, be and they hereby are enjoined from assessing and collecting the same.

"This judgment is subject to exception that said city of Washington and said city clerk shall be allowed to assess and collect against the property of the plaintiffs and other taxpayers outside of the city of Washington, for school bond interest for the year 1926, 16⅔ cents, the same rate of taxation levied and assessed against the property inside of the corporate limits of the defendant city of Washington.

"This judgment is without prejudice to the right of the city of Washington School District to collect such taxes levied and assessed against the property of the plaintiffs and other taxpayers outside of the city of Washington and within said school district for school bond interest for the years 1923, 1924, and 1925, as they are legally authorized to collect by reason of such levies and assessments as have been lawfully made. The question as to the fact of such levies, or the legality of the same, not being presented to the court in this action, the same were not passed upon in this judgment, and neither the plaintiff nor the defendants, in respect thereto, shall be bound hereby."

From the judgment rendered, defendants assign error and appeal to the Supreme Court.

Harry McMullan for plaintiffs.
H. C. Carter for defendants.

CLARKSON, J. Const., Art. VII, sec. 9 (C. S., 2678), is as follows: "All taxes levied by any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution."

Burwell, J., in *Loan Asso. v. Comrs.,* 115 N. C., p. 413, construing this provision, says: "Hence, if there is any statute . . . that attempts to make the burden of taxation it bears greater or less than that which is laid on other property of the same situs and value, such legislation is unconstitutional and void." In *Hart v. Comrs.,* 192 N. C., 165, it is held: "With reference to locality, a tax is uniform when it operates with equal force and effect in every place where the subject of it is found, and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class," citing cases.

The right to levy the tax on 8 September, 1926, is conceded. As to the right under the resolution of 7 October, 1926, the defendants cite a case that refers to the cases of *Wilmington v. Cronly,* 122 N. C., pp. 383 and 389. The first case, in substance, decides: It is competent for the General Assembly to provide for the collection of arrearages of taxes due for past years when ascertained in the mode prescribed by law. Neither the three nor the ten years statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes, unless such act expressly so provides. See *Manning v. R. R.,* 188 N. C., p. 665; *New Hanover County v. Whitman,* 190 N. C., p. 332.

In the present action the attempted levy of 7 October, 1926, in the legal situs or boundaries in the school district in and outside of the city of Washington, N. C., was not uniform and *ad valorem;* therefore, unconstitutional and void. There was no statute cited that gave any right to levy for back taxes (*Wilmington v. Cronly, supra*), nor one cited that gave any right to levy at the time it was done; therefore, the attempted levy of 7 October, 1926, was illegal.

In *Hammond v. McRae,* 182 N. C., p. 754, it is said: "It may be well to note that as to all liabilities theretofore incurred, and all bonds theretofore issued under statutes or elections requiring the levy of a tax on both property and poll, the power and obligation to levy the tax on both will continue, for a State, no more by constitutional amendment than by statute, can impair the vested rights held by the creditors in assurance of his debt. *Smith v. Comrs., ante,* 149, citing, among others, *Port of Mobile v. Watson,* 116 U. S., 289." *Spitzer v. Comrs.,* 188 N. C., p. 30.

In the present case the city of Washington has paid the interest on the bonds, and the levy of 7 October, 1926, is to reimburse the city.

Chapter 102, Public Laws 1925, sec. 72, makes provision for commissioners to enter property escaping taxation, "When no assessment has been made for the years in which said property has so escaped taxation, the board of commissioners shall be authorized to value and assess the same for those years: *Provided,* this shall not apply beyond five years." *Carstarphen v. Plymouth,* 186 N. C., p. 90.

We have been cited to no legislative authority or case, and we have no knowledge of any, that allows a levy for back taxes under the facts and circumstances of this case.

For the reasons given, the judgment of the court below is

Affirmed.

F. M. NEWBY, JR., v. M. P. GALLOP, TRUSTEE.

(Filed 23 February, 1927.)

1. **Sales—Mortgages—Raised Bids—Clerks of Court—Resales—Statutes—Deeds and Conveyances.**

   Under the express provisions of C. S., 2591, the amount of the raise of the bid on lands sold under a mortgage must be paid to the clerk of the Superior Court of the county within ten days from the time of the foreclosure sale; and where the same has been erroneously paid to the mortgagee or trustee within the time specified, it is insufficient, and the purchaser at the foreclosure sale is entitled to his deed upon the payment of the purchase price.

2. **Same—Interveners—Mortgagors.**

   Where a raised bid of the price brought at a foreclosure sale of land under mortgage has not been made as required by statute, the mortgagors are properly denied the right of intervening on the ground that they had been misled by the payment required by the statute to be made to the clerk of the court having been made to the mortgagee.

AGREED CASE, heard by *Daniels, J.*, at January Term, of PASQUOTANK.

J. T. Brothers owned a tract of land in Pasquotank County, containing about ninety acres. On 17 April, 1922, he executed a mortgage upon the land to the Federal Land Bank of Columbia, S. C., for $4,000. On 19 May, 1922, he executed to the defendant M. P. Gallop, trustee, a deed of trust on the land to secure notes aggregating $2,000. On 1 September, 1924, he executed and delivered to the Gallop-Sawyer Realty Corporation a mortgage securing notes for $6,000. The notes described in said lien were due and unpaid. Thereupon Gallop, trustee in the second deed of trust, duly advertised and sold the land at the courthouse door in the county on 13 November, 1926, at which time and place the plaintiff Newby became the purchaser of said property. The purchase price paid by Newby was not more than sufficient to pay off the first lien and the second lien, under which the land was sold, leaving nothing to be applied to the indebtedness of the Gallop-Sawyer Realty Corporation, the holders of the third lien.

On 20 November, 1926, M. B. Sawyer, secretary of Gallop-Sawyer Realty Company, mortgagee, deposited with the trustee, the defendant

M. P. Gallop, a check for $320.25 for the purpose of raising the bid on said land. No report of said sale, or of said raised bid, was made to the clerk of the Superior Court within ten days from the date of said sale. However, on 24 November, 1926, the trustee told the clerk that the bid had been raised and check deposited with him as said trustee. Thereafter, on 27 November, a written report of said sale and of said proposed raised bid was made to the clerk of the Superior Court, but no raised bid was ever deposited with the clerk of the Superior Court of Pasquotank County. The plaintiff Newby demanded a deed for the premises, and the trustee declined to make the deed upon the ground, presumably, that the bid of the plaintiff had been properly raised.

The trial judge held "that the plaintiff's bid for the lands described in the agreed facts had not been legally and properly raised," and further ordered that the defendant trustee execute and deliver a deed to the plaintiff upon payment of the purchase price. The owner of the land, J. T. Brothers, appeared before the judge, requesting that he be permitted to intervene in the cause, and declaring by affidavit that he would have raised the bid on his property but was informed by the defendant trustee that the bid had been raised, and further, that the purchase price bid by the plaintiff was inadequate. The judge declined to permit the said Brothers to intervene in said cause.

George J. Spence and McMullan & LeRoy for plaintiff.
Walter L. Small for defendant.

BROGDEN, J. Two questions are presented for determination:

1. Must the increased bid at a trustee's sale of land under a deed of trust or mortgage be paid to the clerk of the Superior Court or to the trustee?

2. Was the owner of the land, to wit, J. T. Brothers, entitled to intervene in the cause at the hearing?

C. S., 2591, provides in express terms that the sale of property under a mortgage or deed of trust "shall not be deemed to be closed under ten days. If in ten days from the date of the sale the sale price is increased ten per cent, where the price does not exceed $500, and five per cent where the price exceeds $500, and the same is paid to the clerk of the Superior Court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. . . . Where the bid or offer is raised, as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee," etc.

A reading of the statute will disclose that the law, as now written, prescribes the payment of an increased bid to the clerk and not to the trustee, mortgagee, or other person offering the land for sale. The payment of the increased bid to the trustee was ineffectual, and, therefore, the bid, not having been raised as required by law, the plaintiff is entitled to a deed for the premises. *In re Ware,* 187 N. C., 693.

It must then inevitably follow that, if the plaintiff is entitled to a deed under the facts disclosed by this record, the intervener, J. T. Brothers, had no right to intervene at the hearing, and the judgment denying his motion to intervene was correct.

Affirmed.

STATE v. JAMES MARAGOUSIS, ALIAS J. B. MALLOS.

(Filed 23 February, 1927.)

1. **Instructions—Evidence—Appeal and Error.**

Where testimony upon a criminal trial is properly excluded upon motion of the objecting party to strike out, and thereafter in his charge the judge has referred to it as a part of the testimony, the error is prejudicial and a new trial will be granted on appeal.

2. **Criminal Law — Embezzlement — Evidence — Principal and Agent— Questions for Jury.**

Evidence on a trial for embezzlement under a proper indictment, that the defendant obtained money on a check of the prosecuting witness given him to buy a certain business for the witness and converted it to his own use, is sufficient to take the case to the jury.

3. **Criminal Law—Unrelated Offense—Evidence—Appeal and Error.**

Where the defendant is tried for embezzlement, evidence that in an unrelated instance the defendant was guilty of a similar offense is improperly admitted and constitutes prejudicial error.

4. **Evidence—Credibility—Questions for Jury.**

The weight and credibility of competent evidence are questions for the jury.

5. **Appeal and Error—Evidence—Objections and Exceptions.**

The Supreme Court on appeal will not pass upon the question of the admissibility of evidence not objected to on the trial.

APPEAL by defendant from *Grady, J.,* at October Term, 1926, of EDGECOMBE. New trial.

Indictment for embezzlement. Verdict: Guilty. From judgment that defendant be confined in the State's Prison for a term of three years, at hard labor, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. N. Simms (in the Supreme Court only) for defendant.

CONNOR, J. Defendant is charged in the indictment with the embezzlement, on or about 27 March, 1925, of the sum of $750, the property of Elias Apostolou. Both the prosecutor and the defendant are Greeks. They have each lived in the United States for about ten years, during which time they have each been engaged in the business of operating cafes. They first met in this State in October, 1923, since which time they have had many mutual business transactions. Their social relations have also been more or less intimate.

The prosecutor, as a witness for the State, testified that on or about 27 March, 1925, at Tarboro, N. C., he gave to defendant his check for the sum of $750; that defendant collected this check, receiving the money therefor as agent for the prosecutor; that defendant had agreed to purchase a cafe at Williamston, N. C., for the prosecutor, and that the check was given to him and the money received by him as agent of the prosecutor to make said purchase; that defendant did not purchase the cafe, but retained the money derived from the collection of the check and converted it to his own use.

Defendant, testifying as a witness in his own behalf, admitted that he received the check and collected the money; he denied that there was any agreement between him and the prosecutor with reference to the purchase of a cafe at Williamston for the prosecutor, or that the money was received by him as agent for this purpose; he testified that the prosecutor gave him the check in part payment of the amount due the defendant by the prosecutor in the adjustment of certain partnership dealings between them with respect to a cafe at Tarboro, N. C.

While testifying as a witness for the State, the prosecutor detailed at great length a conversation which he testified he had with the defendant at Roanoke, Va., in 1923, relative to the purchase by defendant of certain property in Raleigh, N. C., to be used as a hotel. This testimony was highly prejudicial to defendant, in that it tended to show grave moral turpitude on the part of defendant. Defendant objected to this testimony, and moved the court to strike it from the record. The objection was sustained.

The court, however, in his charge to the jury, in reciting the contentions of the State with respect to the fraudulent intent of defendant, who had admitted the receipt of the check and the collection of the money by him in March, 1925, referred to this testimony in detail as tending to support the said contentions. Defendant excepted to the reference by the court to this testimony, and assigned same as error upon his appeal to this Court.

This assignment of error must be sustained. The error inadvertently made by the learned judge who presided at the trial was, we think, in view of facts and circumstances disclosed by the court, highly prejudicial to the defendant. This error entitles the defendant to a new trial under the authority of *S. v. Love,* 187 N. C., 32.

We cannot sustain, however, the assignment of error based upon defendant's exception to the refusal of his motion made at the close of all the evidence for judgment as of nonsuit. There was evidence from which the jury could find the facts necessary to a conviction for embezzlement; it was properly submitted to the jury. Its credibility and weight was a matter for the jury and not for the court.

There are other assignments of error which we need not discuss, inasmuch as we are of the opinion that defendant is entitled to a new trial for the error pointed out above. The record discloses that defendant was not represented during his trial in the Superior Court by counsel licensed as an attorney at law to practice in the courts of this State, and it is manifest that he was not well advised as to his rights under the laws of this State. Testimony was offered and submitted to the jury as evidence which, upon objection made in apt time, would have been excluded by the learned judge who presided at the trial. In the absence of exceptions to this testimony, duly taken, and made the grounds of assignments of error upon defendant's appeal to this Court, we cannot pass upon the competency of this evidence. The court was not called upon to rule upon the admissibility of this testimony by objections, in accordance with the rules of practice in this State.

Defendant filed a motion in this Court for an arrest of judgment for that the indictment does not charge that the property alleged therein to have been embezzled was either money or a valuable security, or a check, and that there is a variance in the proof. This motion is denied, upon the authority of *S. v. Fain,* 106 N. C., 760. See, also, C. S., 4268, and C. S., 4620.

The indictment is not defective, as contended by defendant; it charges that "defendant, being an agent of Elias Apostolou, did take into his possession the sum of $750, the property of said Apostolou, his principal, and said money then and there did feloniously and willfully embezzle and convert to his own use, etc." Defendant, however, is entitled to a

New trial.

LYNN BOND AND WIFE, RUTH BOND, v. TOWN OF TARBORO.

(Filed 23 February, 1927.)

1. **Constitutional Law—Exemptions—"Homes"—Mortgages.**

Art. V, sec. 3, of the State Constitution relieving from taxation a mortgage on a home given in good faith, to build, repair or purchase a home when the loan so secured does not exceed eight thousand dollars, applies to taxation by cities and towns.

2. Same—Injunction.

The imposition of an unconstitutional tax upon money borrowed to repair or build a "home," may be contested either by first paying the tax under protest and action to recover it, or by injunction otherwise against its collection. C. S., 858, 7979.

APPEAL by defendant from *Barnhill, J.,* at December Term, 1926, of EDGECOMBE. Affirmed.

The necessary facts will be stated in the opinion.

Gilliam & Bond for plaintiff.
George M. Fountain for defendant.

CLARKSON, J. As tenants by the entireties, the plaintiffs own a home in the town of Tarboro, in which they reside. Said home is appraised for county and city taxation purposes at the value of $6,500. Plaintiffs, in good faith and for the purpose of building said home, executed sundry notes to various persons, in the aggregate sum of $8,000. Said notes are secured by a deed of trust on the home. The notes are owned by citizens of Edgecombe County, who are not citizens of Tarboro, and hence the notes are listed for county taxation, but not for city taxation. The county has given to both the owners of the notes and the plaintiffs a tax exemption of 50 per cent of the value of said notes. The plaintiffs contend that the city is also required to give them a like exemption. The city contends that it is not required to so do. We think the city is required to give the exemption.

The plaintiffs paid the tax under protest, and in the time allowed by and in compliance with the statute brought this action claiming that the tax levied or assessed was invalid. C. S., 7979. *Carstarphen v. Plymouth,* 186 N. C., 90.

In *Purnell v. Page,* 133 N. C., p. 129, *Clark, C. J.,* said: "Whether the plaintiff can maintain an injunction against the sale of his property under an illegal tax, or must pay the tax under protest and sue to recover it back, it is equally well settled that he can pursue either remedy," citing cases. C. S., 858; *R. R. v. Comrs.,* 188 N. C., p. 265.

Article V, sec. 3, of Const. of N. C., in part, is as follows: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money: *Provided,* notes, mortgages, and all other evidences of indebtedness, or any renewal thereof, given in good faith to build, repair, or purchase a home, when said loan does not exceed eight thousand dollars ($8,000), and said notes and mortgages and other evidences of indebtedness, or any renewal thereof, shall be made to run for not less than one nor more than thirty-three years, shall be exempt from taxation of every kind for fifty per cent of the value of the notes and mortgages: *Provided,* the holder of said note or notes must reside in the county where the land lies, and there listed for taxation: *Provided further,* that when said notes and mortgages are held and taxed in the county where the home is situated, then the owner of the home *shall be exempt from taxation of every kind for fifty per cent of the value of said notes and mortgages.* The word 'home' is defined to mean lands, whether consisting of a building lot or larger tract, together with all the buildings and outbuildings which the owner in good faith intends to use as a dwelling-place for himself or herself, which shall be conclusively established by the actual use and occupancy of such premises as a dwelling-place of the purchaser or owner for a period of three months," etc. The Legislature has passed an act, in the exact language of the constitutional provision, to put into force that part of the Constitution creating this exemption. Chapter 108, Public Laws of 1925. "Exempt from taxation of every kind" includes municipal taxation. The meaning of the language is too clear for discussion. The policy is not for us, but the people of the State. In discussing the principle of inheritance tax, *In re Davis,* 190 N. C., p. 359, it is said: "Appellants in their brief say that this provision has been held for 50 years to require all taxes levied upon property to be upon a uniform rule. This principle is sound. It is a wholesome provision—there should be no discrimination in taxation. All classes should be taxed alike; there should be no favorites; but equality and uniformity. Equal rights to all, special privileges to none. These are fundamental principles of all stable government. The only exemption from the uniform rule in the above article was that in regard to homes, submitted to the people under Public Laws of N. C., 1923, ch. 240, and adopted at the 1924 fall election. This was to encourage home owning, to make government more enduring by helping to create a land of home owners. The home is the foundation of our civilization. It is the slogan of the American Building and Loan Association: 'The American home is the safeguard of American liberties.' "

From time immemorial the home has ever been the subject of protection. In the famous *Semayne case* (5 Coke, 91 (1605), is the chief authority for the popular legal maxim which says that "every man's house is his castle."

The Const., Art. X, sec. 2, provides that every homestead, or any lot in a city, town, or village, and the dwelling and buildings used thereon, not exceeding in value $1,000, owned and occupied by any resident of this State, shall be exempt from sale under execution for debt. After the death of the owner, this exemption extends to the minority of the children, and for the benefit of the widow during her widowhood.

The purpose of the recent amendment was twofold: first, to encourage the investment of moneys in the building of homes, and, secondly, to enable the prospective home owner to obtain moneys on favorable terms, and to escape a portion of taxes, until the money was repaid. It creates an exemption in favor of the home owner as well as the note holder. In encouraging the ownership of homes within the State, counties and towns, it will more than likely offset any temporary decrease in taxable values. In fact, it will encourage building homes on vacant property. and thus increase taxable values. The purpose of the amendment was laudable and praiseworthy.

We think the judgment in the court below correct, and it is hereby

Affirmed.

DR. JOHN SALIBA v. MOTHER M. AGNES ET AL.

(Filed 23 February, 1927.)

1. **Attachment—Statutes—Sheriffs.**

   Attachment partakes of the nature of an execution before judgment, giving the sheriff an interest in the property seized for the protection of all the parties therein interested, and giving the defendant the right to replevin by conforming to the requirements of the statute. C. S., 807.

2. **Same—Preservation of Property—Plaintiff's Use of the Property—Indemnity.**

   It is the intent of our statutes to preserve property attached, to the end that its value may not be diminished and subject to be sold only under certain statutory provisions; and an order of the trial judge permitting the plaintiff to repossess and use the property under an indemnity bond, pending the litigation, is reversible error. C. S., 807, 824, 812.

APPEAL by defendants from *Nunn, J.*, at September Term, 1926, of PASQUOTANK.

Civil action by plaintiff, owner of a hospital building and grounds, to recover of defendants, members of a sisterhood, etc., rents alleged to be due for said hospital, or damages for breach of the rental contract.

A writ of attachment was issued at the institution of the suit, and the sheriff took into his possession, under said writ, among other articles of personal property, the furnishings of the hospital, including an X-ray machine, which is the subject of this appeal.

The sheriff of Pasquotank County, at the request of the plaintiff herein, turned over to the plaintiff the property seized under said attachment; whereupon, at the September Term, 1926, Pasquotank Superior Court, the defendants, through their attorney, lodged a motion to require the sheriff to repossess himself of the property, which he had taken under the writ of attachment issued herein, and this motion was at first allowed, but later, during the same term, upon motion of the plaintiff, the following order was entered in regard to the possession of said property:

"This cause coming on now to be heard, and being heard, upon defendants' motion to require the sheriff of Pasquotank County to resume possession of the property seized in this action, and further to require the plaintiff to restore such possession to said sheriff;

"And it appearing to the court that, under an agreement heretofore entered into between said sheriff and the plaintiff, acting in good faith, the said sheriff has entrusted the custody of the property seized in this action to the plaintiff, to be used during the pendency of this action, in consideration of the execution by the plaintiff of a good and sufficient bond, in the sum of $2,000, considered for the safe custody and return of said property;

"And it further appearing to the court, and the court so finding as a fact for the purposes of this motion, that the plaintiff bona fide claims to be the owner of a certain one-fifth undivided interest in and to that certain X-ray machine seized in this action, and that, at the time of the institution of this action, the defendants, or some of them, were about to remove the same beyond the jurisdiction of this court:

"Now, therefore, it is ordered by the court that the order heretofore made at this term be set aside, and that the sheriff shall immediately resume possession of all the property seized in this action, except said X-ray machine, and the plaintiff is required to permit the sheriff to forthwith retake the same, upon demand. It is further ordered that, during the pendency of this action, plaintiff be and he is hereby authorized and permitted to retain possession of said X-ray machine, and to use the same, upon his execution of a good and sufficient bond in the sum of $4,000, payable to said sheriff, conditioned to indemnify and hold harmless said sheriff from any and all damages, by virtue of plaintiff's possession and use of said machine."

From this order the defendants appeal, exception having been duly entered for the purpose.

P. W. McMullan for plaintiff.
Ehringhaus & Hall for defendants.

STACY, C. J., after stating the case: Attachment partakes of the nature of an execution before judgment (*Johnson v. Whilden,* 166 N. C., 104), and the sheriff, upon the service of the writ, acquires a special interest in the property attached, which he may enforce for the protection of the rights of all concerned, and "he is liable for the care and custody of such property, as if it had been seized under execution." C. S., 807; *Hambley v. White,* 192 N. C., 31; *Peck v. Jenness,* 48 U. S., 612. But we are aware of no provision of law whereby the sheriff, or the court having jurisdiction over the case, may allow or permit the plaintiff to use the property, such as here attached, pending the litigation, upon the execution of an indemnity bond. Should the plaintiff finally prevail in the action, the attached property is to be sold to satisfy the judgment, as prescribed by C. S., 824, but the defendants, it would seem, are entitled to have the property preserved in the meantime so that it may bring its full value at the sale, and if it cannot be held without material deterioration, pending the litigation, it is to be sold as provided by C. S., 812, and the proceeds held to await final judgment.

Let the cause be remanded for further proceedings, not inconsistent with this opinion.

Error, and remanded.

STATE v. LENORA ANDERSON.

(Filed 23 February, 1927.)

Criminal Law—Burning—Dwelling—Statutes—Evidence—Questions for Jury.

Threats of the tenant in and former owner of the house that she would destroy the house she lived in before the owner by purchase at a foreclosure sale should get the possession he demanded, with the other evidence in this case tending to show the guilt of the defendant, is *held* sufficient to convict her of its burning under the provisions of C. S., 4245.

APPEAL by defendant from *Nunn, J.,* at October Term, 1926, of HYDE.

The defendant was indicted for the willful, wanton, and fraudulent burning of a dwelling-house, in breach of C. S., 4245, and from the judgment pronounced upon her conviction she appealed to the Supreme Court, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Walter L. Spencer and S. S. Mann for the defendant.

PER CURIAM. The defendant's motion to dismiss as in case of nonsuit raises the question whether there is sufficient evidence to sustain the verdict and judgment. The house, formerly owned by the defendant, was purchased by S. L. Gray at public auction in 1924 or 1925. When he told her that he had a deed for the property, she asked whether he would put her out, and remarked, "I would rather see it in ashes than messed up like this"; and when informed that she might be imprisoned if she burnt the house, she answered, "I don't care if I am." She said she would stay there until the end of the year; that the house would never do Gray any good, and he would never move in it; that when she moved away it would be "clean as your hand." The fire occurred about seven o'clock in the evening of 31 December, 1925. The defendant was seen coming from that direction about ten or fifteen minutes after the light was discovered. The roof was burning. She admitted that it was the house she had occupied, and said she and Babe, a little girl, had tried to put the fire out but had failed. She made no outcry, gave no alarm, and refused to go back to the fire. When she declared that the house would never do Gray any good she "seemed to be in a fit of passion."

In our opinion, the motion to dismiss was properly denied. The other assignments of error are without merit. *S. v. Thompson,* 192 N. C., 704; *S. v. Matthews,* 162 N. C., 542; *S. v. Harrison,* 145 N. C., 408.

No error.

R. H. WEAVER v. H. C. NORMAN.

(Filed 23 February, 1927.)

Trusts—Mortgages—Sales—Parol Trusts.

Where the mortgagor of lands has afterwards become a bankrupt and the trustee therein has disclaimed title to the property, owing to the excessive amount of the debt it secured, and the successful bidder at the foreclosure sale has agreed with the mortgagor that he would bid in the mortgaged lands for him upon condition that the mortgagee pay the amount of the mortgage to him: *Held,* upon performance of the condition the title to the property vests in the mortgagor as agreed by parol, though the title to a part of the lands was defective as when the purchaser at the sale made the agreement with knowledge thereof.

APPEAL by defendant from *Barnhill, J.,* at September Term, 1926, of MARTIN. No error.

Action to have defendant declared a trustee for plaintiff, with respect to certain lands described in the complaint.

Issues submitted to the jury were answered as follows:

1. Did the defendant H. C. Norman take title to the lands and premises described in the deed from A. R. Dunning, trustee, and others, to H. C. Norman, recorded in Book R-2, page 164, under and by virtue of an agreement with plaintiff that he should hold same in trust to be reconveyed to plaintiff upon the plaintiff executing and delivering to the defendant and the Harrison Wholesale Company mortgages thereon securing the then existing mortgage debts in favor of defendant Norman and Harrison Wholesale Company? Answer: Yes.

2. If so, was the plaintiff ready, able, and willing, and did he offer to execute notes and mortgages in accordance with said agreement? Answer: Yes.

3. If so, did defendant breach said contract? Answer: Yes.

From judgment upon this verdict, defendant appealed to the Supreme Court.

Martin & Peele and S. J. Everett for plaintiff.
B. A. Critcher for defendant.

CONNOR, J. Prior to 20 December, 1923, plaintiff, by two deeds of trust, had conveyed three tracts of land, situate in Martin County, to trustees to secure the payment of notes executed by him and payable to defendant and the Harrison Wholesale Company, respectively. Plaintiff thereafter filed a voluntary petition in bankruptcy, upon which he was adjudged a bankrupt. His trustee in bankruptcy, upon ascertaining that plaintiff's equity of redemption in said lands was of no value, for the reason that his indebtedness secured by the deeds of trust exceeded the value of the lands, disclaimed any title to or estate in said lands. The trustees in the deeds of trust thereafter sold the said lands under the powers of sale contained in their respective deeds, and on 20 December, 1923, conveyed the same to defendant, H. C. Norman, who was the last and highest bidder at the sale.

Defendant does not deny that he had an agreement with plaintiff with respect to his purchase of the lands at the sale to be made by the trustees; he denies, however, that the agreement was as alleged in the complaint. There was evidence sustaining plaintiff's allegation that defendant, prior to the sale, agreed to purchase the lands and to hold the same in trust for plaintiff, as alleged. The motion for judgment as of nonsuit was properly denied.

Upon compliance by plaintiff and defendant with the terms of the judgment and decree rendered upon the verdict, defendant will have the same security for his debt that he had before the sale. This is in accordance with the agreement as found by the jury.

It is admitted that after the execution of the deeds of trust by plaintiff, it was discovered that plaintiff had no title to one of the tracts of land conveyed therein; defendant, however, knew that at the time he entered into the agreement with the plaintiff, with respect to the purchase of said lands, at the sale by the trustees. Having purchased with knowledge of the condition of the title, he cannot rely upon plaintiff's want of title as a defense to plaintiff's recovery in this action. The judgment is affirmed. *Cunningham v. Long,* 186 N. C., 526; *S. c.,* 188 N. C., 613.

No error.

ICELEAN PAILIN, ADMINISTRATRIX, v. RICHMOND CEDAR WORKS.

(Filed 23 February, 1927.)

Judgments—Default—Motions to Set Aside — Excusable Neglect — Attorney and Client—Principal and Agent—Statutes.

Where a nonresident defendant has been properly served with summons under the provisions of C. S., 600, and refers the defense of the action to its nonresident attorneys, and a judgment by default is rendered for the failure of the nonresident attorneys to employ attorneys practicing law in this State, the nonresident attorneys are to be considered *pro hac vice* as agents for the defendant, and their laches are attributable to it upon defendant's motion to set the judgment aside for surprise, mistake or excusable neglect.

APPEAL by defendant from *Nunn, J.*, at November Term, 1926, of TYRRELL.

Motion to set aside judgment by default and inquiry, rendered in this case by the clerk of the Superior Court of Tyrrell County.

By consent, the motion was heard, in the first instance, by the judge of the Superior Court, who found from the evidence offered the following facts:

"1. That the plaintiff is a resident and citizen of Tyrrell County, N. C., and that the defendant is a corporation, duly organized under the laws of the State of Virginia.

"2. That on 2 June, 1926, a summons in due form, duly issued in said cause from the Superior Court of Tyrrell County, and that, at said time and place, a duly verified complaint was duly filed in said cause.

"3. That on 7 June, 1926, said summons and said verified complaint were duly served on the defendant, by reading same to and leaving copies of same with R. W. Winston, defendant's duly appointed process agent in said State.

"4. That said R. W. Winston immediately forwarded said copies of said summons and complaint to the defendant, which received the same, at its Richmond office, on 9 June, 1926.

"5. That on said 9 June, 1926, or shortly thereafter, H. R. Parrish, vice-president of the defendant, delivered or transmitted said copies to R. R. Parrish, general counsel of the defendant, with the request that he give the matter attention.

"6. That said R. R. Parrish is, and was at all said times herein referred to, a resident of the city of Richmond, in the State of Virginia, and an attorney at law, duly licensed to practice and regularly practicing in said State of Virginia; but that said R. R. Parrish was not at said times licensed to practice in the State of North Carolina, and had not theretofore, and was not at said times practicing regularly or specially in the courts of Tyrrell County.

"7. That at and prior to said times, the firm of Thompson & Wilson, attorneys, resident at Elizabeth City, N. C., and licensed to practice in said State, generally represented the defendant in all litigated matters in the First Judicial District, and in the Federal Court, holding at Elizabeth City; but that said firm held no retainer from said company, and represented said company only in those cases instituted in said district, or in said Federal Court, which were specifically referred to said firm for attention, which said cases included the greater part, but not all, of the litigation in said territory, in which the defendant was interested as a party.

"8. That the above-entitled cause was not referred to said firm of Thompson & Wilson for attention, nor was said firm advised by the defendant of the existence or the pendency of same, nor did said firm know of the existence or pendency of same, until 8 October, 1926.

"9. That the defendant has a meritorious defense to said action."

Upon the foregoing facts, the court, being of opinion that the defendant had shown no mistake, inadvertence, surprise, or excusable neglect, such as would entitle it to the relief sought, denied the motion, and from this ruling the defendant appeals.

Sam S. Woodley and McMullan & LeRoy for plaintiff.
Thompson & Wilson and Manning & Manning for defendant.

STACY, C. J. Upon the facts found by the judge, supported as they are by competent evidence, it must be conceded, we think, that the defendant is not entitled to have the judgment set aside on the ground of "mistake, inadvertence, surprise, or excusable neglect." *Seawell v. Lumber Co.,* 172 N. C., 320. Under the decisions construing the statute applicable, C. S., 600, if a party who is sued employ nonresident counsel, not to appear in the case himself, but whose duty is merely to select other counsel to attend to the matter, and he fail to make such selection, the first-named counsel is to be considered as an agent *pro hac vice* of the defendant, whose negligence will be imputed to the party himself, and hence not excusable. *Manning v. R. R.,* 122 N. C., 824; *Bank v. Palmer,* 153 N. C., 503; *Edwards v. Butler,* 186 N. C., 201; *Schiele v. Ins. Co.,* 171 N. C., 426.

This position is not seriously combatted by the defendant, but it was argued on the hearing that the judgment should be set aside for irregularity and for want of sufficient allegation of negligence. These contentions, it would seem, are not presented on the present record, but it may be doubted as to whether they could avail the defendant, even if properly before us. *Finger v. Smith,* 191 N. C., 818; *Livestock Co. v. Atkinson,* 189 N. C., 250; *Ellis v. Ellis,* 190 N. C., 418.

The motion was correctly denied.

Affirmed.

B. N. PUGH v. J. R. NEWBERN.

(Filed 23 February, 1927.)

Arrest and Bail—Partnership—Misappropriation of Funds—Accounting—Reference.

In matters of partnership one of the parties may not recover in an action against the other for misappropriation of partnership funds until a balance has been struck, or some definite amount has been legally ascertained to be due the plaintiff, and where the controversy requires a reference to ascertain whether any amount is due by the defendant, it is reversible error for the trial judge to order his arrest, and require a bail bond from him.

CIVIL ACTION, before *Nunn, J.*, at December Term, 1926, of CAMDEN.

The plaintiff alleged that he and the defendant entered into a partnership agreement in January, 1926, for the purpose of contracting with farmers to raise Irish potatoes for said partnership during the year of 1926. That they were to pay the farmers raising potatoes a certain price and should furnish the potatoes, fertilizers, barrels and barrel covers in equal amounts; that the potatoes should be shipped in the name of the defendant, who was to receive the proceeds from the sale thereof, and that out of the proceeds, after deducting the full amount of expenses for fertilizers, potatoes, barrels and barrel covers, that the profit should be equally divided between the plaintiff and the defendant, and any loss should be borne equally. That according to the terms of the agreement the plaintiff was to furnish fertilizer and the defendant was to furnish potatoes at cost, and that each of said partners should pay one-half of the other expenses. It was further alleged on the part of plaintiff that there were outstanding debts for potatoes and barrels and other expenses amounting to several thousand dollars, and that the defendant collected the proceeds from the sale of potatoes amounting to $22,244.47, and has "wrongfully and unlawfully converted the same to his own use and refused to pay over to the plaintiff the amount due upon the indebtedness under the contract, and to the plaintiff his part thereof. That he claims he has spent the money and has not applied it as he was compelled to do under the contract and under the law," and that the defendant "has wrongfully and unlawfully and fraudulently taken the proceeds from the said potatoes and converted the same to his own use and used the same for his own purposes."

The plaintiff further alleged "that it is necessary to have an account taken of the dealings between the plaintiff and the defendant showing the amount that is due to the different parties under the contract in this case. That a balance shall be struck showing the amount of funds in the hands of defendant under this contract, and that judgment should be rendered against him in favor of plaintiff for the full amount of moneys in his hands, wrongfully, unlawfully and fraudulently converted to his own use, and that the proceeds therefrom shall be used first to pay any amounts that may be due to the parties under this contract for raising the potatoes, for barrels furnished, for hauling, and for fertilizer, and after the payment thereof for one-half the net proceeds under this contract between the plaintiff and the defendant.

Wherefore, the plaintiff prays the court that an account be taken showing the amounts advanced by each party, the amounts due under this contract to various parties, the amount of money received by the defendant, the amount he has paid out and that judgment shall be rendered against him for twelve thousand dollars, the amount due to the plaintiff, and for the cost of this action, and for such other and further relief as the nature and circumstances of the case may demand."

The defendant answered, admitting the contract of partnership and that the potatoes were to be sold in the name of the defendant, and that the net profit, after the payment of all expenses and the usual commission for making sales, should be divided equally between the plaintiff and the defendant, and further that certain moneys were expended by the parties under the supervision of the plaintiff, who "has failed and refused to render a statement or account thereof." That "at the time of said dealings between said parties, the plaintiff was engaged in selling seed potatoes, barrels and barrel covers, as well as fertilizer, on his own account and for his individual profit, and was further engaged in buying Irish potatoes for and on account of this defendant; that, after said contract was made, the defendant not only furnished and delivered plaintiff barrels, covers and seed potatoes, . . . but also a large number of barrels of seed potatoes and barrel covers in addition thereto, . . . and because of plaintiff's failure to render a statement or account of his dealings as aforesaid, the defendant has no knowledge or information sufficient to form a belief as to the number or value of the barrels of seed potatoes or barrel covers used to carry said contract into effect. . . . That during the period of dealings between himself and the plaintiff he has turned over to the plaintiff from time to time large sums of money for which, as aforesaid, plaintiff has failed to render to the defendant any statement or account."

The defendant further denied that he has failed or refused to pay over to the plaintiff any amount due him, and avers "that no portion is or can be due to the plaintiff until there has been a full accounting and settlement of the partnership affairs so as to ascertain whether the same resulted in a profit or loss."

After filing the complaint, the plaintiff made an affidavit and secured an order of arrest for the defendant from the clerk of the Superior

Court of Camden County, in which order of arrest the defendant was held to bail in the sum of ten thousand dollars. Thereupon, the defendant made a motion to vacate the order of arrest and to release and discharge the defendant and his sureties "from any and all obligations under and by reason of their execution of the bond heretofore executed in said cause." Thereupon, the motion to vacate said order of arrest was heard by the judge, who declined to vacate the order of arrest or discharge the defendant and his sureties.

Whereupon, from this judgment, the defendant appealed to the Supreme Court.

Aydlett & Simpson for plaintiff.
McMullan & LeRoy for defendant.

BROGDEN, J. The question of law presented is this: Has one partner the right to have the other partner arrested for an alleged wrongful conversion of partnership funds in a civil action brought for an accounting?

The general rule is that one partner cannot sue another partner at law until there has been a complete settlement of the partnership affairs and a balance struck. *Graham v. Holt,* 25 N. C., 300; *Newby v. Harrell,* 99 N. C., 149; *Loan Association v. Ferrell,* 114 N. C., 301; *Ledford v. Emerson,* 140 N. C., 288; *Dowd v. Holbrook,* 152 N. C., 547; *Martin v. McBryde,* 182 N. C., 175.

Thus, in *Loan Association v. Ferrell, supra,* the following principle of law was approved: "It is well settled in this State, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transaction in the absence of a settlement of the accounts." Again, in *Ledford v. Emerson, supra, Justice Hoke* declares the law thus: "It is a well recognized principle that during the continuance of a partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in a general partnership account. This has sometimes been put on the ground that such a suit would necessitate that the party complained of should be both plaintiff and defendant. But I apprehend a reason of more moment is that as to such a transaction, till a full accounting is had, it cannot be ascertained or declared what portion of such claims belong to the one or the other; and so it is true that one partner, during the continuance of the partnership, cannot ordinarily bring trover or trespass against the other by reason of acts concerning partnership property, unless the same be destroyed or removed entirely beyond the reach or control of the complaining party, for one has no more right to deal with the property than the other." This general rule is supported by the decided weight of authority. Many of the leading authorities are collected in a valuable note found in 21 A. L. R., p. 12.

There are, however, well established exceptions to the general rule. A partner may maintain an action at law against his copartner upon claims growing out of the following state of facts:

1. Claims not connected with the partnership.
2. Claims for an agreed final balance.
3. Claims upon express personal contracts between the partners.
4. Failure to comply with an agreement constituting a condition precedent to the formation of the partnership.
5. Where the partnership is terminated, all debts paid, and the partnership affairs otherwise adjusted with nothing remaining to be done but to pay over the amount due by one to the other, such amount involving no complicated reckoning.
6. Where the partnership is for a single venture or special purpose which has been accomplished, and nothing remains to be done except to pay over the claimant's share.
7. When the joint property has been wrongfully destroyed or converted.
8. When one partner has been guilty of fraud in contracting the debt or in incurring the obligation or by concealing the property or by other device defeating the rights of the complaining party. *Newby v. Harrell, supra; Ledford v. Emerson, supra; Martin v. McBryde, supra; Owen v. Meroney,* 136 N. C., 475.

In the case now under consideration the trial judge found no facts, but it clearly appears from the pleadings that there are serious disputes of fact between the parties, the settlement of which will require a more or less complicated reckoning. By fair interpretation, the complaint is based upon the theory of an accounting between the parties. There is no allegation of fraud in the making of the contract itself, as appeared in the case of *Ledford v. Emerson, supra,* and, as the entire case rests upon the theory of an accounting and an adjustment of contrary demands between the parties, it does not fall within the boundaries of any of the exceptions recognized by law. Hence, it cannot be ascertained what portion of the money in controversy belongs to each of the parties or whether, indeed, any part thereof would belong to the plaintiff.

Therefore, we are of the opinion that the arrest of the defendant was improvidently granted, and that the trial judge was in error in refusing to vacate the order of arrest made in the cause.

Reversed.

T. J. FLEMING v. CHARLOTTE ELECTRIC RAILWAY COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 23 February, 1927.)

1. **Negligence—Street Railways—Collisions—Automobiles.**

   An electric street railway company, through its employees on a car operating upon its tracks upon the streets of a city is held to the exercise of due care under the circumstances in avoiding a collision with an automobile crossing its tracks in front of the car, and where the evidence is conflicting as to whether the driver of the automobile reasonably thought that the defendant's car had about stopped at the wrong place to let passengers off, and suddenly and without warning started ahead, and thereby caused the collision, which would not have occurred had the defendant's motorman kept a lookout in front of him, and exercised due care, defendant's request for a directed verdict in its favor is properly refused.

2. **Instructions—Negligence—Proximate Cause.**

   While in an action to recover damages for an injury alleged to have been negligently inflicted, the judge should ordinarily define the meaning of "proximate cause" as applied to the evidence of the case, his omission to do so will not be considered as reversible error to the defendant's prejudice, when he has not done so with reference to the issue of contributory negligence, and the jury could not have misunderstood the principles under the general charge.

3. **Same—Excerpts from Charge—Considered as a Whole — Appeal and Error.**

   Instructions if correct when considered as a whole will not be held as reversible on appeal because of seeming error, when regarded in its disjointed or fragmentary parts.

APPEAL by defendants from *Harding, J.*, and a jury, at May Term, 1926, of MECKLENBURG. No error.

This is an action for actionable negligence by plaintiff against defendants for injuries sustained in a collision with a street car of defendants. Plaintiff's allegations were to the effect: that the street car of defendants, on the evening of 13 May, 1925, at about 8:30 o'clock p.m. was being operated over its tracks on South Tryon Street. It had to turn at West Bland Street. That the mortorman in charge of the street car had practically "brought same at or almost near to a standstill as if to let off two passengers, which said passengers were then aboard said street railway car, and had gone to the front of said street railway car as if to alight therefrom," although the regular stoppage was around the curve and on West Bland Street. That plaintiff was driving an automobile going south on his way home and, believing that defendant was stopping its car for the purpose of letting passengers off, and believing it would remain stopped long enough to allow the two passengers to alight, proceeded with due care to continue his travel on South Tryon Street towards his home, and when he got about mid-center of the defendant's track the defendant, through its agent the motorman, suddenly and without warning or notice started up the street car. That by keeping a proper lookout he saw, or in the exercise of ordinary care could have seen, plaintiff crossing the track, and did wilfully, wantonly and negligently run the street car into plaintiff's automobile and pushed it some 15 or 20 feet down its track and jammed the plaintiff's automobile in which he was sitting against a pole, wrecking the car and seriously injuring plaintiff.

Among the allegations of defendants' negligence was the fact that after striking plaintiff's automobile, defendant failed to stop the street car, but continued to push the automobile some 15 or 20 feet against the lighting pole and injured plaintiff. That defendant was negligently stopping its car "at the wrong place, thereby subtly luring, misleading and deceiving plaintiff, making said plaintiff believe that the said defendants were going to stop one hundred feet or more this side of said regular stopping place," etc.

These allegations of plaintiff were denied by defendants. Defendants allege that instead of defendants running into the plaintiff, the plaintiff ran his automobile into the street car of defendants. "That the plaintiff undertook to overtake said street car and get ahead of it before it made the turn into West Bland Street, and in doing so ran into the street car as it was making the turn and knocked off the front door of said street car." Defendants, as a further defense, set up the plea of contributory negligence.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: Ten thousand dollars ($10,000)."

Numerous assignments of error were made by defendants and appeal taken to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

T. L. Kirkpatrick and J. A. Lockhart for plaintiff.
W. S. O'B. Robinson, Jr., for defendants.

CLARKSON, J. The first contention of defendant is: "His Honor erred in refusing to instruct the jury that if they found the facts to be as testified to by the witnesses and as disclosed by the evidence, they should answer the first issue in the negative, as requested by the defendants' first prayer for instructions; and also in refusing to instruct the jury that if they found the facts to be as testified to by the witnesses and as disclosed by the evidence, they should answer the second issue in the affirmative as requested by the defendants' second prayer for instructions." We think the court below correct in refusing to instruct the jury as requested by defendants.

For example, as to plaintiff's contention of defendants' negligence, one of his witnesses, John Robinson, testified as follows: "I know Mr. Fleming. . . . I came along West Bland Street near the intersection of West Bland Street and Tryon on 13 May, 1925, about 8:30 p.m. . . . I saw Mr. Fleming's car and the street car, the street car and the automobile coming down the street. The street car came nearly to a standstill. It was not far from the corner, and just was rolling. Mr. Fleming was crossing the track, and the street car started up. It pushed the car around the corner. I couldn't tell how fast the street car started up. It pushed the car around the corner, up against the post about fifteen feet."

Numerous witnesses testified, including plaintiff, that the occurrence was as testified to by the above witness. The defendants' numerous witnesses disputed these facts and testified to the effect that plaintiff in trying to get ahead of the street car before it made the turn into Bland Street ran into the street car and knocked off its front door.

Plaintiff contends that he drove his automobile ahead of the street car and upon the track. The motorman, without giving any warning whatever, suddenly speeded up the street car and struck plaintiff's automobile. At the rate of speed at which he was traveling, he could have stopped the street car almost instantly, certainly in a distance of three or four feet, but after striking plaintiff's automobile, he continued to run the street car and pushed the plaintiff's car a distance of 15 to 18 feet and jammed it against a light post and *then inflicted the injuries here complained of.*

In *Ingle v. Power Co.,* 172 N. C., at p. 753, it is said: "The motorman is required to run at a lower rate of speed and observe a more careful lookout for persons who may cross, and ordinarily are crossing, a street car track at all hours. The street car company has no right to the exclusive use of the street, and it must respect the rights of pedestrians and drivers of vehicles of all kinds, who have the same right to use the streets as themselves. *Norman v. R. R.,* 167 N. C., 537; *Moore v. Street R. R.,* 128 N. C., 458." *Hanes v. Utilities Co.,* 191 N. C., 13.

The principle is thus stated in *Heinel v. People's Ry. Co.,* 67 At. Rep., at p. 173 (22 Del., 428): "Both the plaintiff and the defendant had a right to use it (street) for all purposes of a public highway. The right of each must be exercised with a regard to the rights of the other, and in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other. . . . Therefore, if the plaintiff had negligently gone upon or near the car track without looking, and was so standing there with his back to the car at the time of the accident, yet if the motorman saw, or by the reasonable use of his sense could have seen, the plaintiff so standing in time to stop the car and avoid the accident, it was his duty to do so, and if he failed to do so the company would be liable. If, however, the plaintiff moved from a position of safety to a position of danger near or upon the track of the railway on which the car was running so suddenly as to make it impossible for the motorman to stop the car before the collision, the defendant cannot be held liable for the resulting injury to the plaintiff; so, if the motorman, after he saw, or by the exercise of reasonable care could have seen, the plaintiff in a position of danger, did everything that a reasonably careful and prudent man would do under like circumstances to prevent the accident, the defendant would not be liable."

The evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

We think there was evidence sufficient to justify plaintiff's contention and the court below in submitting the matter to the jury.

Although not tried out on the theory of last clear chance, yet the allegations of plaintiff in the complaint would also have entitled him to the issue and the evidence is plenary to support it.

In the celebrated case of *Davies v. Mann,* Vol. 10, M. & W. Reports, p. 546, *Parke, B.,* all the Judges concurring, held to be "perfectly correct" *Lord Erskine's* charge: "The learned judge told the jury that, though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." *Casada v. Ford,* 189 N. C., at p. 746 and cases cited.

Defendant further contends: "His Honor erred in failing to declare and explain to the jury the meaning of the term 'proximate cause'; or to instruct the jury what facts they must find in order to arrive at a verdict that the negligence of the defendant was the proximate cause of the plaintiff's injury."

In the case of *Davies v. Mann, supra, proximate cause* was not defined. It ordinarily should be, but in the present case it will not be held prejudicial error, as it was not defined as an element either in negligence or contributory negligence.

In *Construction Co. v. R. R.,* 184 N. C., p. 179, the charge on contributory negligence in the court below was: " 'If you answer the first issue "Yes," you will then consider the second issue; the burden is on the defendant in that issue to prove by the greater weight of the evidence that the plaintiff's servant driving the truck, was negligent, and that his negligence contributed to the injury.' . . . Counsel for plaintiff requested the court to add to his charge the further instruction that, unless such negligence on the part of plaintiff's driver was *the proximate cause of the injury,* they would answer the second issue 'No.' This was declined. . . . It would seem that the plaintiff was entitled to this additional instruction." *Campbell v. Laundry,* 190 N. C., 649. The error in the *Construction Co. case, supra,* was in not charging that it must be the proximate cause. The definition was not requested.

As to the other assignments of error (3d and 4th), in reference to the charge of the court below, the two excerpts cannot be sustained. The charge must be considered and examined as a whole.

10 S. E. Digest, N. C. Ed., Trials, p. 12589: "Instructions must be considered as a whole, and if, as a whole, they state the law correctly, there is no reversible error, although a part of the instructions considered alone may be erroneous," citing numerous North Carolina cases.

As said in *Davis v. Long,* 189 N. C., at p. 137: "The case is not complicated as to the law or facts. The jurors are presumed to be men of 'good moral character and sufficient intelligence.' They could easily understand the law as applied to the facts." *Kepley v. Kirk,* 191 N. C., p. 690. We can find

No error.

ED. M. LUTTRELL v. R. H. HARDIN.

(Filed 23 February, 1927.)

1. **Principal and Surety—Negligence—Insurance — Indemnity — Loss—Contracts—Actions.**

The surety on an indemnity bond against loss resulting to another from the negligence of the owner in driving his automobile, is not liable unless a loss has been sustained before action brought, when this liability is excluded by the terms of the bond.

2. Same—Evidence.

Where a surety is on a bond of the owner of an automobile indemnifying him against loss for his negligence, evidence of the suretyship is inadmissible in an action brought against the owner, when under the terms of the bond the surety cannot be held liable in the action until the owner has sustained a loss.

3. Appeal and Error—Evidence—Motions to Strike Out Evidence—Exceptions.

Where a question asked a witness on the trial of an action is competent, exception to his answer when incompetent in part, should be taken by motion to strike out the part that is objectionable, and an appeal then taken to the refusal of the judge to do so.

4. Negligence—Automobiles—Statutes—Speed Limits—Accident—Proximate Cause—Concurring Cause—Evidence—Questions for Jury.

While exceeding the speed limit in driving an automobile upon the highway is negligence *per se,* it must be the proximate concurring cause of an injury alleged to have been negligently inflicted to render the owner liable in damages to a guest in his car, and under conflicting evidence as to whether the injury solely resulted from an unforeseeable or unavoidable accident, the question is one for the jury under proper instructions from the court.

APPEAL by plaintiff from *Lane, J.,* and a jury, at July Term, 1926, of AVERY. No error.

Material allegations of plaintiff: On the night of 27 November, 1924, he became a passenger in an automobile owned and driven by defendant, with the intention to drive from his home at Shull's Mill, N. C., to Banners Elk, N. C., and from there to Linville, N. C., in order that defendant, who is a licensed and practicing physician, might render professional services to plaintiff's brother. Between nine and ten o'clock in the evening of said 27 November, 1924, at a point in the county of Avery, near Banners Elk, the automobile in which plaintiff was riding with defendant and another was overturned at a curve in the highway and plaintiff was thrown therefrom and suffered serious bodily injuries. That plaintiff's injuries were caused wholly and proximately by the negligence of defendant, in that: (a) Defendant negligently and recklessly operated his car in violation of the laws of North Carolina; (b) defendant in approaching said curve was driving at a speed greater than was reasonable and proper and in excess of the speed of ten miles per hour; (c) defendant failed to keep a proper lookout for his safety and the safety of his guests; (d) defendant failed to keep his motor car under control at all times, as required by law. Plaintiff therefore prays judgment, etc.

Defendant in his answer denied the material allegations of negligence, and says: That at the time of the accident the defendant was driving a comparatively new Buick car with the plaintiff and one Mrs. Bradley in the car with him, and that he was running at a very moderate speed when for some cause unknown to the defendant the lights in the car suddenly went out; that it was dark and foggy, and when the lights went out the defendant was unable to see the road, and before the car could be stopped it slipped off the lower bank of the road; that after the lights went out the car did not move more than six or eight feet until it went over the embankment; that the defendant had been driving the car and keeping it in good condition, and the lights had always been good and had never given any trouble before prior to this night and the defendant believes that the switch controlling the lights was accidentally touched by either the plaintiff or Mrs. Bradley and suddenly turned off, and said injury was caused by no fault of defendant, but was an unavoidable accident; that the plaintiff himself informed this defendant that his injury was in no way due to any negligent act on the part of the defendant, and has repeatedly told a number of people other than the defendant that it was a pure accident and unavoidable, and that he attached no blame whatever to the defendant; that the plaintiff was voluntarily riding with the defendant, merely as an accommodation to him, and has not paid and was not expected to pay anything for the services; that the defendant was not a carrier of passengers for hire and had no right to transport passengers for hire.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

"2. What damages, if any, is the plaintiff entitled to recover? No answer."

The other material facts necessary for the decision of the case will be set forth in the opinion.

Plaintiff assigned numerous errors and appealed to the Supreme Court.

Squires & Whisnant and Johnson J. Hayes for plaintiff.

Frank A. Linney, W. C. Newland, S. J. Ervin and S. J. Ervin, Jr., for defendant.

CLARKSON, J. The first group of assignments of error on the part of plaintiff is to the exclusion of certain evidence by the court below, which the plaintiff contends, if not a direct admission, was by inference an admission of liability.

From careful analysis of these assignments of error, we think the court below was correct in holding the evidence incompetent. The evidence appears to be an indirect method to get before the jury that defendant had indemnity insurance. As an example, from the group (fourth assignment): "Q. I will ask you if you told Mr. George Robbins that if the suit had been brought for only $25,000 you would have had no complaint? A. I told him that this damage suit was brought against me for more insurance than I had; that if they should get judgment against me for more insurance than I am covered by, that I would not have the money to pay it. I told him I didn't object to Ed. getting some money if it didn't bother me, but as to the amount, I don't know. He was talking to me about it, and I was sorry of it, but I couldn't help it, but I don't mean to admit that I was liable by saying that, for I was not."

It is well settled in this jurisdiction: "That the assured . . . must actually sustain a loss before an action will lie upon the indemnity policy, as this is expressly required by the terms." *Killian v. Hanna, ante,* p. 20. It has been repeatedly held that the fact that a defendant in an actionable negligence action carried indemnity insurance could not be shown on the trial. Such evidence is incompetent. *Lytton v. Mfg. Co.,* 157 N. C., 331; *Featherstone v. Cotton Mills,* 159 N. C., 429; *Hensley v. Furniture Co.,* 164 N. C., 148; *Starr v. Oil Co.,* 165 N. C., 587; *Holt v. Mfg. Co.,* 177 N. C., 170; *Stanley v. Lumber Co.,* 184 N. C., 302; *Bryant v. Furniture Co.,* 186 N. C., 441; *Allen v. Garibaldi,* 187 N. C., 798; *Fulcher v. Lumber Co.,* 191 N. C., 408.

The following question was asked defendant: "What rate of speed were you traveling?" To which he answered: "I couldn't say. I was driving moderately. I was not going over fifteen miles an hour. I don't know that I was going that much. I just don't know exactly, but I was not going over 15 miles. I was going at what I thought was a safe speed relative to the road."

Conceding, but not deciding that defendant's answer, "What I thought was a safe speed relative to the road," was incompetent. The question propounded witness was competent, and defendant should have asked that the incompetent part of the answer be stricken out. This he did not do.

In *Gilland v. Stone Co.,* 189 N. C., at p. 786, it is said: "If defendant deemed the statement of the witness, which was not in response to the question directed to him by counsel, but voluntarily made, incompetent and prejudicial, it should have directed its objection to the court, accompanied by a motion to strike the objectionable statement from the record, and by a request for an instruction, if desired, to the jury that the statement had been stricken from the record and should not be considered as evidence. To a ruling upon this motion an exception would lie as a basis for an assignment of error upon appeal to this Court. *Huffman v. Lumber Co.,* 169 N. C., 259; *Wooten v. Order of Odd Fellows,* 176 N. C., 52; *S. v. Green,* 187 N. C., 466." *Hodges v. Wilson,* 165 N. C., 323; *Young v. Stewart,* 191 N. C., p. 302.

We come now to the main controversy below. Plaintiff claiming actionable negligence—defendant claiming sudden emergency or accident. E. M. Luttrell, Dr. R. H. Hardin and Mrs. Bettie Bradley, the latter who was working at Grace Hospital at Banners Elk, were in a Buick roadster, six cylinder car, driven by Dr. Hardin, going from Shull's Mills, via Valle Crucis, to Banners Elk. Plaintiff was going to see a sick brother who Dr. Hardin was to give medical attention next morning. The car went off the road about 9:00 o'clock p.m., 27 November, 1924. Plaintiff testified, in part: "Before we arrived on this turn where the wreck happened, I noticed Doctor was running too close to the left hand side of the road, and I told him he had better haul his car in, and he made no reply, and when we got up two or two and a half car lengths of where we went over the bank, I said, 'My God, Doctor, hold your car; we will go off the road,' and he made an attempt to hold the car in the road, and he made an attempt to back his car. There was a sharp elbow curve in the road at that point. It was between twenty and thirty feet from the break of the ditch bank to the break of the road. We were traveling at about eighteen miles an hour. The car went over the bank and I got smashed up. . . . The accident took place between Ed. Shoemaker's home and Banners Elk. There was a winding curve and a very high bank and looked like a straight road from that curve to the next place. We had not entered the curve when I again called Dr. Hardin's attention that his car was too close to the edge of the road, about 200 feet or more and within two and one-half car lengths when I again called his attention to haul his car in. He was acquainted with the road and went over it at all times of the night. He was driving a Buick roadster. The curve was from 20 to 30 feet wide. There was a bank on the right and the road was so constructed it was on a level to where the car swerved I would say sixteen feet. The car left the road about the center of the curve. Dr. Hardin had time enough to stop his car the first time and sufficient time to stop it the second. At the rate of speed he was running he would not have run over four feet until he could have stopped his car dead still. I have never driven a Buick, but I know the distance it would take to stop a Buick of that type, and at fifteen miles an hour he could have brought his car to a dead stop in four feet." Luttrell testified further that the lights were on and had been all the way up. Dr. Hardin had had no trouble with the lights before that.

The following witnesses testified for defendant:

Mrs. Bettie Bradley: "We saw the lights of the hospital, and we went around this turn, and lights went off and we were off of the bank. The lights went out and we went off. Dr. Hardin tried to stop the car."

Dr. R. H. Hardin: "Luttrell got in my car in front of his home (Shull's Mills), and my car was at that time, as far as I know, in good shape. I had had it inspected by the garage man, and so far as I knew it was all right. We started off to Banners Elk. . . . We were going up the Bowers Mountain, and we noticed the lights flickered down right around the curve, and I jarred the switch on and off, and worked with it, and they came back strong, and we went on, and all at once the lights dimmed off again, and I put my foot on the brakes and tried to stop and could not, and went off of the curve. I was about the center of the road when the lights went off. There is a sharp curve. I was just approaching this curve when the lights went off. . . . When the lights went off Mr. Luttrell said, 'Can't you put it in,' and he said, 'Dock, we are gone.' He said that just as we went off. I had not heard him make any statement before we started off, because there was not time. He told me to pull it over, as it went off the bank, after we struck the soft dirt. I tried all the time to stop the car. When we started off I put my foot on the brake, possibly too hard—I don't know—just as hard as I could."

Henry Voncannon testified that plaintiff did not state how it occurred, but stated that he didn't put any blame on Dr. Hardin; that the accident was unavoidable, nobody was to blame. . . . He said he was not driving recklessly.

V. C. Allison: "I went to visit plaintiff at the hospital, about three or four days after the accident, and he told me that they were riding along slow and the lights went out, and they went off the road."

Mrs. Shoemaker: That she lived close by, and that Dr. Hardin came to her home about 9 o'clock to get a lantern; "When I got to the car the lights were off."

Mrs. Mont Johnson: "I had a conversation with the plaintiff, Ed. Luttrell, after the injury; me and him were talking about it; he said he could not blame Dr. Hardin because it was an accidental wreck."

W. G. Drawn: "I heard him say that it was an accident that Dr. Hardin could not help. Heard him say it three or four times."

Press Jennings was at the place soon after car went off road and testified: "Heard Luttrell make a statement when he and Mrs. Bradley were in the truck; I was between the two, and Mrs. Bradley said, 'Press if we die, we don't want anybody to think hard of Dr. Hardin or to think he was at fault, for it was an unavoidable accident,' and Mr. Luttrell said, 'That is right; I don't want Dr. Hardin blamed, because the lights went off, and it could not be prevented.' "

Dr. Tate: "Plaintiff made a statement to me; said he did not feel that Dr. Hardin was to blame, and that it was an unavoidable accident."

Jim Shoemaker: "I asked him how that wreck happened, and he told me that the lights went off on the turn of the curve and that caused the wreck."

Bynum Banner: "They were driving slow; the lights went, and all he knew was that they went off the bank."

Charlie Coffey: "Best I remember, I asked him how the accident occurred, and he said that they were just coming along and that the lights went off, and the next thing he knew they were off the road. That is about all he said. He did not say anything about Dr. Hardin, only he said it was an unavoidable accident."

The court below charged fully the law of the road; called attention to the different statutes applicable to the facts of the case; that failure on the part of the defendant to do what the law required was negligence *per se,* and under the disputed facts left it for the jury to say what the facts were and, if defendant was negligent, whether or not such negligence was the proximate cause or one of the proximate causes of the plaintiff's injury. *Albritton v. Hill,* 190 N. C., p. 429; *Fleming v. Holleman,* 190 N. C., 449.

In 1 Thompson's Commentaries on the Law of Negligence, sec. 68, it is said: "Where an injury is the combined result of the negligence of the defendant, and an accident for which neither the plaintiff nor the defendant is responsible, the defendant must pay damages, unless the injury would have happened if he had not been negligent." *Lawrence v. Power Co.,* 190 N. C., p. 664.

The defendant's defense, in substance, was: That the cause of the wreck was not an excessive rate of speed; that if defendant was driving at more than ten miles an hour (the law of the road at that time), that was not the proximate cause of the injury to plaintiff, although it was a violation of the statute. That the sole proximate cause of the injury was the going out of the lights suddenly and accidentally, and that that was due to no lack of care on the part of defendant; that he had his car inspected a short time before that, and that his lights were burning properly, and that his lights suddenly went out and caused him to drive to a portion of that road that looked straight, when in fact it was a curve; that the sudden going out of his lights was the sole and only proximate cause of the injury, due to no fault of his, and not due to any way in which he was driving the car, and that that is the dominant, efficient cause, the cause without which the injury would not have occurred, was the going out of the lights; that if the lights had stayed on, that he had the car under proper control, and that the injury would not have occurred.

In *Lee v. Donnelly,* 95 Vt., 121, it is said: "If he (the driver of an automobile confronted with a sudden emergency) acted in the light of all the surrounding circumstances as a careful and prudent man would reasonably act under like circumstances, he did all the law required of him. Whether he did this was a question for the jury." *Gravel v. Roberge,* 134 Atl. Reporter (Me.), at p. 375; *Massie v. Barker,* 224 Mass., 423.

3 Babbitt on the Law Applied to Motor Vehicles, p. 832, sec. 1311, says: "The court may instruct the jury that if they find that the injuries resulted from an unavoidable accident unmixed with negligence, the verdict should be for the defendant, *as where the motor dies suddenly without warning, leaving a car in a dangerous situation,* and a charge is correct which states that defendant is not liable in case of an accident, and that an accident is such an unexpected catastrophe as occurs without any one being to blame for it."

An accident is defined in *Thomas v. Lawrence,* 189 N. C., at p. 524, as: "An unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence; the effect of an unknown cause, or the cause being known, an unprecedented consequence of it; a casualty. Black's Law Dictionary. *Crutchfield v. R. R.,* 76 N. C., 320. 'An employer is not responsible for an accident simply because it happened, but only when he has contributed to it by some act or omission of duty.' *Martin v. Mfg. Co.,* 128 N. C., 264; *Simpson v. R. R.,* 154 N. C., 51; *Lloyd v. R. R.,* 168 N. C., 646; *Bradley v. Coal Co.,* 169 N. C., 255."

Plaintiff contends, however, that defendant got in this unfortunate position of danger by violating the speed limit and concedes that the car would have remained in the road if the lights had not gone out, still it would have stopped before reaching the bank if it had been moving at the lawful speed. Therefore the violation of the speed regulations by the defendant was the proximate cause of the injury, and it would not have happened if the law had been obeyed. The prayers for instruction by plaintiff were not given in the language asked for, but in substance by the court below, and the charge as a whole covered every aspect relied on by both plaintiff and defendant. The law was clearly set forth by the court below and the facts left to the jury on every attitude and phase of the case. The jury found for the defendant. On the whole record we can find no reversible or prejudicial error.

No error.

JOHN D. SPINKS v. PERCY B. FEREBEE, MAYOR, AND S. E. COVER, J. W. BROWN, W. W. ASHE AND G. B. HOBLITZELL, COMMISSIONERS OF THE TOWN OF ANDREWS, LUDLOW ENGINEERS, INC., AND J. L. LUDLOW.

(Filed 23 February, 1927.)

1. **Actions—Pleadings—Several Defendants—Nonsuit as to One.**

   Where the complaint in an action against a town and a private corporation by a fair and reasonable interpretation alleges a separable cause of action against each, and a judgment as of nonsuit is entered as to the town upon the evidence, under the provisions of C. S., 2831-2960, it does not affect the liability of the town.

2. **Appeal and Error—Instructions—Record—Presumptions.**

   Where upon appeal to the Supreme Court the charge of the trial judge does not appear of record, it is presumed to have been correctly given.

3. **Contracts—Breach—Damages—Partnership—Principal and Agent.**

   Where there is evidence that the plaintiff is a civil engineer in the business of laying out and constructing hydro-electric water plants for municipal corporations, and after the preliminary work has agreed with the defendant construction company that he would bid for the work upon an expense and profit sharing basis, and the defendant has agreed to put in a bid for both, but has, unknown to the plaintiff at the time, secured the contract for itself: *Held,* the defendant is liable to the plaintiff in the amount the plaintiff would have received for his share of the profits had the defendant acted in good faith under the agreement they had entered into.

4. **Pleadings—Nonsuit—Amendments.**

   The trial judge may in his discretion allow an amendment to pleadings after a judgment as of nonsuit has been entered as to one of the defendants, when a good cause of action is alleged as to the other, C. S., 547, and likewise the Supreme Court on appeal, under C. S., 1414.

5. **Appeal and Error—Review.**

   Ordinarily the Supreme Court can only review the case upon matters of law or legal inference.

APPEAL by defendants, Ludlow Engineers, Inc., and J. L. Ludlow, from *Harding, J.,* and a jury, at August Term, 1926, of CHEROKEE. No error.

Plaintiff is a civil and consulting engineer and engaged in the business of laying out municipal and industrial enterprises, hydro-electric power plants and municipal waterworks. Ludlow Engineers, Inc., are engaged in like business, and J. L. Ludlow is general manager. Percy B. Ferebee is mayor, and the other defendants commissioners of the town of Andrews, N. C.

Plaintiff alleges, in substance, that on or about 5 February, 1923, the defendants, Percy B. Ferebee, mayor, S. E. Cover, J. W. Brown,

W. W. Ashe and J. B. Hoblitzell, commissioners of the town of Andrews, made and entered into a contract with the plaintiff, John D. Spinks, who was an independent contractor, together with the defendant, the Ludlow Engineers, Inc., and the defendant, J. L. Ludlow, which parties the plaintiff, John D. Spinks, called in, which contract provided, in substance, that the plaintiff, together with the defendant, Ludlow Engineers, Inc., and J. L. Ludlow, would make a preliminary survey of the proposed hydro-electric power plant, which the town of Andrews desired developed, and submit the same, together with an estimate of the cost of developing the said proposed hydro-electric power for the said town of Andrews, under and by terms of which said contract the said John D. Spinks, and his associates, were to receive for the preliminary report the sum of $800, and in case the report was favorable, that then for the supervision of the construction of said hydro-electric plant, the said plaintiff and his associates should receive the sum of six per cent of the cost of construction, and if such construction should take more than twelve months, then the said plaintiff and his associates should receive, in addition to the six per cent on the cost of construction $500 per month for each month over twelve months required to complete the project.

That in accordance with said contract, plaintiff proceeded with the work of making preliminary survey and report of same; this done it was decided by the mayor and commissioners that construction of the plant should proceed; and thereupon Ludlow Engineers, Inc., and Ludlow proceeded to Andrews, and in conjunction with the mayor and commissioners, prepared a new contract with Ludlow Engineers, Inc., and Ludlow, thereby breaching the contract made with Spinks; that this was done for the purpose of depriving plaintiff of his rights under the first named contract, under which plaintiff had done his part of the contract and was and has at all times been ready, able and willing to carry out every provision in the contract; but the mayor and commissioners, and Ludlow Engineers, Inc., and Ludlow, with the intent and purpose of depriving plaintiff of his rights in the contract and his fees arising thereunder, have proceeded with no reference to this plaintiff with the construction of said plant, and the mayor and commissioners have paid to Ludlow Engineers, Inc., and Ludlow, all the fees arising under the contract, as same have accrued, notwithstanding the fact that notice has been given them to hold and retain for plaintiff's benefit fifty per cent of all fees accruing by virtue of the construction of the plant, being six per cent on the cost of construction, being that portion of the fees that plaintiff is entitled to under the contract; that the cost of construction was not less than $300,000, and one-half of six per cent thereof, to which this plaintiff is entitled, amounts to $9,000, etc.

Plaintiff demanded judgment against the defendants and for general relief. The material allegations of the plaintiff were denied by defendants.

At the close of plaintiff's evidence the defendant, town of Andrews and its commissioners, officially and individually, made a motion for judgment as in case of nonsuit, which was sustained. A similar motion was made by Ludlow Engineers, Inc., and J. L. Ludlow, which was refused.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the plaintiff, John D. Spinks, and the defendants, Ludlow Engineers, Inc., and J. L. Ludlow, enter into a contract with each other that the plaintiff and the said defendants would make a preliminary survey of the proposed hydro-electric power plant which the town of Andrews desired developed, and submit the same, together with an estimate of the cost of development of said hydro-electric plant, and supervise the construction of the same upon the terms and conditions set out in the complaint? Answer: Yes.

"2. Did the defendants, Ludlow Engineers, Inc., and J. L. Ludlow breach said contracts, as alleged in the complaint? Answer: Yes.

"3. What damage, if any, is plaintiff entitled to recover of the defendants, Ludlow Engineers, Inc., and J. L. Ludlow? Answer: $3,000."

Judgment was duly rendered on the verdict. The defendants, Ludlow Engineers, Inc., and J. L. Ludlow, assigned many errors and appealed to the Supreme Court.

Necessary material facts will be stated in the opinion.

Walter E. Brock, John H. Dillard and M. W. Bell for plaintiff.
Bryson & Bryson and Moody & Moody for defendants.

CLARKSON, J. We think the main assignment of error of the defendants, Ludlow Engineers, Inc., and J. L. Ludlow, relates to the refusal of the court below to nonsuit the plaintiff at the close of all the evidence. The issues tendered by them are in support of this contention.

The complaint, although alleging a cause of action against the town of Andrews, by fair and reasonable interpretation, also alleges a cause of action against Ludlow Engineers, Inc., and J. L. Ludlow. When the town of Andrews went out of the action by nonsuit (see C. S., 2831-2960, certain restrictions upon municipal contracts), it did not necessarily carry the Ludlow Engineers, Inc., and J. L. Ludlow. We think, from a careful inspection of the record, that there was sufficient allegations in the complaint and evidence to support the issues tendered by the court below.

The charge of the court below is not in the record, the presumption of law is that it was correct, and the court charged the law in accordance with the evidence. The evidence of plaintiff tended to show that Ludlow Engineers, Inc., and J. L. Ludlow, its general manager, supplanted the plaintiff; that the plaintiff originated the business with the town of Andrews and took Ludlow Engineers, Inc., and J. L. Ludlow in with him.

J. D. Spinks testified: "I suggested to them in the conference (board of commissioners of town of Andrews) that Ludlow Engineers, Inc., and I would do this work jointly if they would join me in the enterprise; they were agreeable to it. I left next morning for Winston-Salem and went to see Mr. Ludlow as soon as I got back, and Mr. Justin, and discussed my visit to Andrews. We agreed to divide the profits and operating expenses equally; we agreed to go into this matter jointly and divide the profits, that is deduct the expenses, and divide the profits 50-50. We agreed to bear the expenses equally." Joel D. Justin, hydro-electric engineer for Ludlow Engineers, Inc., was sent to Andrews and closed the job with the town of Andrews. Telegram from Andrews, N. C., 5 February, 1923, to J. D. Spinks: "Job closed, including contract for engineering, if work goes ahead," etc. 5 February, 1923, Justin to Spinks: "As per my wire we closed contract tonight," etc. 7 February, 1923, Justin to Spinks: "In recent letter I stated that I would mail contract to you. I am unable to do this as they have placed drawing of the formal contract in the hands of a local attorney. . . . At the present rate it will be two days before he gets it finished. The phraseology that he argues about does not amount to anything, but I do not propose to let him put anything over. However, I will bring signed contract in with me without doubt as the whole thing has been agreed to in substance." Contract was dated 10 February, 1923, by and between town of Andrews, N. C., of first part, and J. D. Spinks, of county of Forsyth and State of North Carolina, and the Ludlow Engineers, Inc., etc., of the second part. The original contract was changed—April inserted for February and February was marked out, and the name of J. D. Spinks marked out. In the attestation clause the name of J. D. Spinks was marked out. This contract originally dated 10 February, 1923, with February and Spinks marked out, was signed on 10 April, 1923, "The Ludlow Engineers, Inc. (Seal), by J. L. Ludlow, Prest." On 27 April, 1923, Percy B. Ferebee, mayor, wrote Spinks, in answer to his letter, as follows: "Mr. Ludlow, when he met with us, stated that as you were not at all familiar with hydro-electric work, and as it would be they who would take the responsibility of the work, that he was going to ask the board to make the contract to the Ludlow Engineers, Inc., without mention of your name; that the matter was brought to his attention by you, and as you advised him that you had the job, or practically had it, he would not make a competitive bid. *He further stated that the two of you had a working agreement where you were to work jointly, and that he would adjust the matter to your entire satisfaction.*"

The Ludlow Engineers, Inc., and J. L. Ludlow, defendants, denied any supplanting of Spinks, and alleged that the town of Andrews gave the contract to the Ludlow Engineers, Inc., and the plaintiff had no interest in it; that plaintiff was paid in full for preliminary survey.

The evidence introduced on both sides showed that the contest waged around the issues submitted. The pleadings, liberally construed with a view to substantial justice between the parties, permitted the issues submitted by the court. They embodied proper inquiries as to all essential matters or determinative facts of the controversy. The complaining defendants fully understood plaintiff's cause of action and were in no way misled. The case was tried upon its merits. No substantial rights of defendants were in any way affected by a liberal construction of the pleadings or the issues submitted.

It was said, in speaking to the question in *Sewing Machine Co. v. Burger,* 181 N. C., at p. 247: "One of the most important purposes of the adoption of The Code system of pleading was to enable parties to determine and settle their differences in one action. The law favors the ending of litigation, and frowns upon the multiplicity of suits."

The court below, under C. S., 547, had, under certain circumstances, a right to allow plaintiff to amend; so has this Court, under C. S., 1414, but we think, under the pleadings, liberally construed, it was not necessary. *Jones v. Mial,* 82 N. C., at p. 257; *Ricks v. Brooks,* 179 N. C., p. 204; *Killian v. Hanna, ante,* p. 17; *S. v. McCanless, ante,* 200.

In this Court we cannot pass on the facts. We can only review decisions of the court below "upon any matter of law or legal inference." The jury below has found the issues in the plaintiff's favor. From a careful review of the record and the briefs, we can find in law

No error.

C. L. BOOTH, TRUSTEE OF ELIZABETH JAMES ET AL., v. SAMUEL HAIRSTON.

(Filed 23 February, 1927.)

1. Deeds and Conveyances—Gifts — Parent and Child — Registration—Statutes.

A deed of gift of lands from a mother to her son is void *ab initio* unless registered in two years under the provisions of our statute, C. S., 3315.

2. Same—Wills—Devise.

And where the son has failed to register his deed as the statute requires, for whatever reason, he may not successfully claim the lands against a devise thereof to his sister's child under the will of her grandmother, it appearing that the mother continued for more than two years to exercise absolute ownership over the lands until the date of her death.

3. Same—Curative Statutes.

Where a mother has made a deed of gift of her lands to her son, who has failed to have it registered in the time required by C. S., 3315, and it is for that reason void, a later curative statute extending the time for registration cannot revive the void deed to the son. Under the facts, vested rights thereunder have been acquired. Constitution of North Carolina, Art. I, sec. 17.

STACY, C. J., and ADAMS, J., dissenting.

APPEAL by defendant from *Shaw, J.,* and a jury, at May Term, 1926, of GUILFORD. No error.

The material facts will be set forth in the opinion.

Meade & Meade and King, Sapp & King for plaintiffs.

Brooks, Parker & Smith, Andrew Joyner and Malcom Horne for defendant.

CLARKSON, J. This action was brought by plaintiffs against the defendant to set aside a deed made by Mrs. A. E. George to her son Samuel Hairston, defendant, to certain land in the city of Greensboro. Mrs. George's first husband was George Hairston, father of defendant. The deed in controversy bears the date of 21 February, 1921, and purports to convey to the defendant, Samuel Hairston, the land in litigation in fee simple. The deed was acknowledged before J. L. Bagby, commissioner of deeds of North Carolina, in Richmond, Va., on the above date, and was filed for registration in the office of the register of deeds of Guilford County on 15 January, 1924.

It was alleged in the complaint that the deed was without consideration, void and of no effect, and a cloud on plaintiffs' title and prayer that it be canceled of record. The defendant in regard to the circumstances of the execution of the deed to him, in his answer says: "At the same time she produced a deed to this defendant, which paper she had and which had never been seen by this defendant before, and as to which this defendant had no sort of knowledge of any kind or character, and Mrs. A. E. George then stated that as he, the defendant, knew, she had always intended to give to him a fair proportion of her estate that she greatly appreciated his lifelong consideration of her and her feelings; that she had had this deed prepared for the purpose of carrying out her desire that he should have this property in Greensboro." That the "same was legal, valid and effectual for every purpose and was then and there delivered by Mrs. A. E. George to this defendant. . . . And the transaction was simply one of mother desiring to give to her son certain property she owned and executed deed therefor in due course. . . . That after receiving this deed, this defendant saw no reason for hurrying in having it recorded and deposited same in his safety deposit box in The First National Bank with the intention of allowing it to remain until convenient opportunity should arise in a short time to forward it to Guilford County to be placed on record." That for the reason of illness and not having any occasion to do so, he did not go to Greensboro until 15 January, 1924, to attend a business meeting, when he took the deed and had it recorded on that date. The answer shows that the deed was one of gift.

In the court below it was tried out on an issue found by the jury against the defendant. The defendant assigned numerous errors in the trial below and appealed to this Court. The plaintiffs, appellees in this Court, filed a supplemental brief and contend that the deed was one of gift and void because not registered within two years, and cites C. S., 3315, which is as follows: "All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration."

The deed which plaintiffs are attacking bears date and was signed on 21 February, 1921, and was recorded on 15 January, 1924—two years, ten months and 25 days after the record evidence discloses that it was signed, and ten months and 25 days after the time allowed by the statute for recording.

It is contended by plaintiffs, therefore, that it had been void under the foregoing statute ten months and twenty-five days at the time it was put on record. Plaintiffs further contend that if the deed under which defendant is claiming title had been a valid and bona fide deed of gift, as contended by defendant, and even if it were not absolutely void by reason of the way it was obtained, as contended by plaintiffs in the court below, then the deed became void by the very terms of the statute in consequence of the defendant keeping it in his lock box for more than two years after its delivery without placing it on record. That it was necessary in order for the defendant to obtain title under this deed of gift to place it upon record. The statute made that a condition precedent and title to the property did not vest in him until it was recorded in accordance with the terms of the statute, and plaintiffs insist that by reason of defendant's failure to comply with the statute aforesaid the deed under which he claims is absolutely void and no title to the land ever vested in the defendant. The statute itself declares that it shall be void.

The defendant, in answer to the position taken by plaintiffs in their supplemental brief contends that the plaintiffs cannot for the first time upon appeal raise the question as to the application of C. S., 3315, *supra.* The fact that there is no allegation made by the plaintiffs in their complaint to the effect that the deed in question is void under the statute, or that the statute is relied upon by the plaintiffs, and therefore the statute has never become an issue in this case.

It is said in *Shipp v. Stage Lines,* 192 N. C., p. 478: "A party is not permitted to try his case in the Superior Court on one theory and then ask the Supreme Court to hear it on another and different theory. *Warren v. Susman,* 168 N. C., 457."

This position is sound and wise, but has no application to the facts in the present action. The pleadings, both complaint and answer, show that the deed in controversy was one of gift. The plaintiffs allege it was without consideration, void and of no effect. If it was one of gift and under the statute void, as contended by plaintiffs why consider defendant's assignments of error in the court below on the issue there tried out. *Cui bono?* If error should be found and a new trial granted, how would it profit the defendant? On the entire record the facts are admitted and a question of law alone arises. If a new trial was awarded, no different result could follow. By analogy where a charge of the trial court is erroneous, but the entire testimony relevant to the inquiry was before the court, it being perfectly apparent that in no aspect of it is there any defense available, our decisions are to the effect that a new trial should not be granted. Our system of appeals is founded on public policy and appellate courts will not encourage litigation by granting a new trial which could not benefit the litigant and the result changed upon a new trial, and the nongranting was not prejudicial to his rights. *Bateman v. Lumber Co.,* 154 N. C., p. 253; *Rierson v. Iron Co.,* 184 N. C., p. 363; *Davis v. Storage Co.,* 186 N. C., 676. "They will only interfere therefore, where there is a prospect of ultimate benefit." *Cauble v. Express Co.,* 182 N. C., p. 451.

The defendant further contends that the statute, Public Laws 1924, Extra Session, ch. 20, ratified 20 August, 1924, extends the time of registration and cures the defect. "That the time is hereby extended until September first, one thousand nine hundred and twenty-six, for the proving and registering of all deeds of gift, grants from the State," etc. It further provides: "All such instruments which have heretofore been or may be probated and registered before the expiration of the period herein limited, shall be held and deemed from and after such registration to have been probated and registered in due time if proved in due form and registration thereof be in other respects valid." Plaintiffs say the deed having become void under the statute, cannot be validated by the act of 1924. . . . That in order for the defendant to acquire title under the deed it must have been recorded within two years, otherwise it is void. That it was void before the act of 1924 was passed and the act cannot constitutionally validate a void deed and thus disturb vested rights. When this enabling or curative act was passed, Mrs. A. E. George had willed the property in controversy to plaintiffs— on 24 April, 1923— after the two years for registration had expired. Of course the will speaks at her death. C. S., 4165. She died on 1 January 1925, and her will was duly probated. Plaintiffs claim title under the will in this action and the same land is claimed by deed of gift by defendant that was willed to plaintiffs.

Before and after the deed of gift was executed, and until her death, the rents of the property were paid each month to Mrs. A. E. George. The insurance on the building was in her name. The property was on the tax books listed in her name. Thus, after the deed was made, and up to her death, Mrs. George exercised dominion over the property—all with the knowledge and adverse to defendant. For example:

"Checks of Armour & Company, payable to Mrs. Ann E. George, the first of said checks being in words and figures as follows, to wit:

Auditor's No. 203834. Treasurer's No. 73009.

Chicago, Ill., 23 December, 1920.

Pay to the order of Mrs. Ann E. George $150.00

One hundred and fifty and 00/100 dollars.
(H.W.) Armour & Company
To Continental & Comml. Nat. Bank, Cummings.

Payable at Chicago, Ill.
Messrs. Kountz Bros. Bankers.

Endorsed: Mrs. Ann E. George, also endorsed by the Federal Reserve Bank of Chicago, and Commercial Bank of Danville, Va., C. L. Booth, Cashier."

The last check "dated Chicago, Ill., 21 November, 1924. Armour & Co., to Mrs. Ann E. George, amount $150.00—To Continental and Commercial Nat. Bank, Chicago, Ill. Payable to Messrs. Kountz Bros. Bankers, N. Y. C. *Endorsed by Mrs. Ann E. George,"* etc.

There are forty-four of these checks for $150.00, each payable to Mrs. Ann E. George and endorsed by her, in the record.

We think under the facts and circumstances of this case that Mrs. Ann E. George had such vested right to the property and that she had the right to will it to plaintiffs, and that defendant by his acts and conduct is now estopped to claim under the deed of gift registered after the two years; and the validating statute, if constitutional, cannot be invoked to impair the vested right.

Walker, J., in *Dew v. Pyke,* 145 N. C., p. 303, points out the difference between the two statutes as to grants and gifts and construes them and says: "It is provided that a deed of gift shall be proved and registered within two years after its execution. So far the statute is like that in the case of grants. But the Legislature did not think this language sufficient to invalidate the deed of gift if the provision as to registration was not complied with by the donee, so it took the precaution to add that if the deed is not registered within two years it shall be void, 'and shall be good against creditors, and purchasers for value, only from the time of registration.' If the requirement that the deed of gift should be registered within two years after its execution was intended as a condition, noncompliance with which should invalidate it, why superadd the words 'or otherwise (it) shall be void'? Revisal, sec. 986. (C. S., 3315.) This may be considered as a legislative construction of the words 'shall be registered within two years after its execution,' to the effect that if the instrument is not so registered it shall not be evidence, unless the time for registration is extended and a new authority to register it is thereby given. . . . But it will be observed that the enrollment is annexed as a condition to the passing of the title, as in the case under our statutes of mortgages, deed of gifts and the other instruments above enumerated. This is all very significant, and plainly evinces, what we have confidently asserted to have been the intention, that the material difference in language should produce a marked unlikeness in meaning, and what difference could there be in the sense of the two statutes other than that, in the one case a failure to register the instrument within the specified time should invalidate it, and in the other it should not? This reasoning is supported by the view of the law manifestly entertained by *Ruffin, J.* (afterwards *Chief Justice*) in *Jones v. Sasser,* 14 N. C., 378, for he recognizes the existence of the very distinction we have made between the act which there declared that gifts of slaves should not be good and available unless registered within one year after their execution, and the general statute merely requiring registration within a given time of other instruments."

In the case of *Robinson v. Barfield,* 6 N. C., p. 420, the *feme covert* was never privately examined, and the law declares the deed a mere nullity and void. The Legislature passed an act confirming the title notwithstanding the *feme covert* was not privately examined. This Court declared that this could not be done. *Seawell* and *Daniel, JJ.,* both delivering opinions.

In *Hicks v. Kearney,* 189 N. C., p. 319, it was said: "And in *Lowe v. Harris,* 112 N. C., 473: 'But the Legislature of North Carolina is restrained by Article I, section 10, of the Constitution of the United States, and Article I, sec. 17, of the Constitution of North Carolina, not only from passing any law that will divest title to land out of one person and vest it in another (except where it is taken for public purposes after giving just compensation to the owner), but from enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory," citing numerous authorities including the *Robinson case, supra.*

No law can be held valid which divests property out of one and gives it to another, without consent of the owner. This is a universal rule in the states of the union. *Stanmire v. Taylor,* 48 N. C., 207; *Lowe v. Harris, supra.* In certain exceptional cases of necessity and for public purposes, private property may be taken upon payment of "just compensation."

"Judge Patterson, in the case of *Vanhorner, lessee, v. Dowance,* 2 Dallas, 310, says: 'The Legislature has no authority to make an act divesting one citizen of his freehold and vesting it in another, without a just compensation; it is inconsistent with the principles of reason, justice and rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance in every free government, and lastly, it is both contrary to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.'" *Robinson v. Barfield, supra; Hicks v. Kearney, supra.*

It will be interesting to call attention to some of the cases in regard to vested rights and retrospective or retroactive statutes, other than those already referred to.

In *University v. Foy,* 5 N. C., p. 58: "The 41st section of the Constitution declares that 'schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices, and all useful learning shall be duly encouraged and promoted in one or more universities.'—In obedience to this injunction of the Constitution, the Legislature established the University, and in the year 1789, granted to the trustees of the University, 'all the property that had theretofore or should thereafter escheat to the State.' In the year 1800, the Legislature repealed this grant.—(*Locke, J.,* for the Court held in substance): This repealing act is void, it being in violation of the 10th section of the bill of rights, which is a part of the Constitution and declares 'that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land.' "

Jones v. Sasser, 14 N. C., p. 378, the facts. "The plaintiff claimed the slave in dispute under a deed of gift from his father, Arthur Jones, Sr., dated 5 April, 1827, which was not registered until 20 February, 1830. The defendant claimed under a deed from the same person, dated 5 August, 1829, which was registered 10 January, 1830. His Honor instructed the jury that, as the plaintiff claimed under a deed of gift, no title passed by it until it was registered, and, until that took place, that the title remained in his father; that if the latter retained the possession until the deed of August, 1828, the execution of that deed, and its prior registration, gave the defendant title which would not be divested by the subsequent registration of the deed to the plaintiff. A verdict was returned for the defendant, and the plaintiff appealed." *Ruffin, J.,* said: "By the act of 1806, R. c., 701, no gift of slaves is good or available unless made in writing. 'Neither,' the act continues, 'shall such act be valid unless the writing shall be proved or acknowledged, and registered within one year after the execution thereof.' These words seem to denote a purpose in the Legislature, then, to make the registry acts effectual, at least in reference to the gift of slaves." The judgment of the court below was affirmed. *Gregory v. Perkins,* 15 N. C., p. 50.

In the case of *Tooley v. Lucas,* 48 N. C., p. 146, the headnote discloses the nature of that action: "Parol evidence of the contents of a deed conveying a slave, is not admissible, if it was not proved and registered, although full proof has been made of the loss or destruction of the instrument, and proper notice given of the intention to offer secondary proof of its contents."

In *Spivey v. Rose,* 120 N. C., p. 165, *Montgomery, J.,* said: "The plaintiff further objected to the admissibility of the deed on the ground that it was void in law, in that it appeared to be voluntary on its face, being a deed of gift and had not been registered within two years after its execution. His Honor committed no error in overruling this objection. The General Assembly has regularly, every two years, enacted statutes extending the time for the registration of conveyances of real estate, since the execution of this deed up to the time of its registration, the first one on 31 March, 1871, before the death of the testator—even before the will was made. Such acts have been declared by this Court to be in the discretion of the Legislature, and deeds of gift embraced in their provision. *Jones v. Sasser,* 14 N. C., 378; *Scales v. Fewell,* 10 N. C., 18."

It will be noted that in the above case the enabling registration act was passed before the two years for registration had expired and the deed of gift had become void. This proposition is not disputed.

The enabling act was ratified 20 August, 1924, and extended the time until 1 September, 1926. The deed in question had been void one year, five months and twenty-nine days at that time and we think that this statute has no retroactive operation and that the Legislature has no power to pass an act affecting vested rights. "Especially will a statute be regarded as operating prospectively when it is in derogation of a common-law right, or the effect of giving it retroactive operation will be to destroy a vested right or to render the statute unconstitutional. 25 R. C. L., 787; Black on Interpretation of Laws, 252." *Hicks v. Kearney, supra.*

In *Campbell v. Holt,* 115 U. S., p. 623, it is said: "It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of the property, without due process of law." See *Dunn v. Beaman,* 126 N. C., p. 770.

These secret gifts by deed, most frequently to a member of a family, often to the exclusion of others, a good sound public policy enacted into law requires that within two years they should be recorded so that notice be given to the world—"or otherwise shall be void."

Under the facts and circumstances of this case the enabling or curative statute in regard to registration could not validate the void deed, and the statute had no power to resuscitate so as to affect the rights of Mrs. A. E. George. Upon the record we can find

No error.

STACY, C. J. and ADAMS, J., dissenting.

STACY, C. J., dissenting: The decision in this case, as I understand it, is put upon the ground that the deed of gift from Mrs. A. E. George to her son, Samuel Hairston, is void because not registered within two years after its making, and that the Legislature is without power, following a *hiatus* of one year five months and twenty-nine days after it was declared void under the terms of C. S., 3315, to authorize its registration and render it valid as between the parties by the curative or extending act of 1924. I respectfully dissent from this position, for the reasons so clearly stated by *Ruffin, J.*, in *Jones v. Sasser,* 14 N. C., 378: "The Legislature has certainly the power to enlarge the time for registration, and to pronounce its effect, and if to them it seem good, the courts must execute their will. From time to time, acts giving further time for registration have been passed; and in each, deeds of gift, and indeed all conveyances, except mortgages and deeds of trust, are expressly included; and it is enacted that they shall be as good and valid as if they had been proven and registered within the time before allowed by law. . . . Acts of this character have always received a literal construction; in fact, they are susceptible of none other. The only exception is the case of *Scales v. Fewell,* 10 N. C., 18, in which there was an *hiatus* of one year between the extending acts of 1818 and 1821, and during the interval rights vested in other persons. The Court thought the last act was not intended to defeat such vested rights. But in every other case deeds registered at ever so remote a period have been held, by force of the new registry acts, to be as operative as if registered within the periods prescribed by the acts of 1715 or 1806, or any other general statute."

It will be observed that in the case of *Scales v. Fewell,* above mentioned, the Court held the bill of sale, there registered after the time required for its validity under the act of 1715, good as between the parties, by virtue of the enabling act of 1821, subject only to intervening vested rights of third persons. *Hall, J.,* speaking of the effect of the extending act, said: "I think that that act comprehended and validated the registration of the deed in question as to all future transactions, yet I do not think that it divested rights (of third persons) under the execution which had vested before that time."

The case of *Robinson v. Barfield,* 6 N. C., 391, is also cited for the position that a deed by a *feme covert,* not privately examined as required by the act of 1751, could not be validated by a subsequent act of the Legislature. This case was correctly decided, because in the meantime the *feme covert* died, and vested rights intervened. The case of *Barrett v. Barrett,* 120 N. C., 127, on the other hand, where no vested rights of third persons had intervened, is directly opposite: "The Legislature has power to pass, repeal or modify the laws regulating the manner of executing, proving or recording conveyances, and the exercise of such power to cure defective compliance with former statutes cannot be an interference with vested rights as between the parties to such instruments. *Tatom v. White,* 95 N. C., 453, 459. It only becomes so when third parties have acquired rights which would be impaired by the act which is intended to cure the defective execution, probate or registration. . . . It is competent for the Legislature to provide what mode of probate shall be valid, and when it does so it can affect past as well as future probates, except that the rights of third parties, claiming prior to the validating act, cannot be divested. Retrospective legislation is not necessarily invalid."

To like effect is the decision in *Steger v. Building Asso.,* 208 Ill., 236, where a mortgage deed, void for want of proper probate, was validated by subsequent statute, the Court saying: "The Legislature may ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality and the curative act interferes with no vested rights." *U. S. Mortg. Co. v. Gross,* 93 Ill., 483.

"If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley's Const. Lim. (7 ed.), p. 531.

The Supreme Court of the United States, in *Mattingly v. District of Columbia,* 97 U. S., 687, speaking of the power of the Legislature in such cases, tersely states the same principle, as follows: "It may, therefore, cure irregularities, and confirm proceedings which, without the confirmation, would be void because unauthorized, provided such confirmation does not interfere with intervening rights."

See, also, *Fibre Co. v. Cozad,* 183 N. C., 600; *Anderson v. Wilkins,* 142 N. C., 157; *Janney v. Blackwell,* 138 N. C., 437; *Lowe v. Harris,* 112 N. C., 472; *Board of Education v. Comrs.,* 183 N. C., 300.

The last sentence of the quotation made by the Court from *Justice Walker's* opinion in *Dew v. Pyke,* 145 N. C., 300, is very significant: "This may be considered as a legislative construction of the words 'shall be registered within two years after its execution,' to the effect that if the instrument is not so registered it shall not be evidence, unless the time for registration is extended and a new authority to register it is thereby given."

There is a distinction made in some of the cases between the force and effect of an act which undertakes to validate a deed, void *ab initio,* and one which simply extends the time for registering a deed, but for which it would be declared void under the statute requiring its registration. *Dever v. Cornwell,* 10 N. D., 123, 6 A. & E. Enc. of Law (2 ed.), 940; 24 A. & E. Enc. of Law (2 ed.), 111; Cooley's Const. Lim. (7 ed.), 528 *et seq.*

But it is the uniform holding, for example, that the invalidity of a mortgage or conveyance of the homestead exemption, executed by the husband alone, may be cured by a subsequent act of the Legislature, if no third persons have acquired vested rights in the land prior to such enactment. *Wildes v. VanVoorhis,* 15 Gray (Mass.), 139; note, 45 A. L. R., p. 436. In so validating a deed, the Legislature is only giving effect "to the act of the parties according to their intent," says the Supreme Court of Arkansas in the case of *Sidway v. Lawson,* 58 Ark., 117.

The status of unregistered deeds and those registered under extension acts is thus succinctly stated in *Phifer v. Barnhart*, 88 N. C., 333 (second and third head-notes):

"2. The bargainee in an unregistered deed has a legal title which, though incomplete, cannot be defeated by the mere act of the bargainor in executing another deed to a third party, without notice and whose deed is registered.

"3. Although such deed cannot be given in evidence until registered, and does not therefore convey a perfect legal title, yet, when registered, it relates to the time of its execution, and the title bcomes complete."

These conclusions are supported by numerous authorities cited in the opinion, and the case itself has been followed and cited with approval in a number of later decisions. See Shephard's Citations and Allen's Reported & Cited Cases, 1926.

Speaking to the question in *Tooley v. Lucas,* 48 N. C., 146, *Nash, C. J.,* said: "To the legislative department of the government, belongs the power to enact laws, by which the people are to be governed, and to the judiciary, the right to expound them. While acting within the scope of their legitimate authority, their will is to be obeyed; none have a right to disobey it. Where the language of an act is plain and perspicuous, the act must speak for itself, unless its enactment transcends the power of the Legislature. In this case the Legislature has left no doubt upon the question presented to us. 'All sales of slaves shall be in writing, attested by at least one credible witness, or otherwise shall not be deemed valid; and all bills of sale of slaves shall within twelve months after the making thereof, be proved in due form, and recorded; and all bills of sale, and deeds of gift, not *authenticated* and *perpetuated* in manner by this act directed, shall be *void and of no force whatever.'* Rev. Stat., ch. 37, sec. 19. I need not refer to the proviso in that section. In the succeeding section provision is made for the registration of such conveyances. Here, there is no ambiguity; no room for construction. If not *authenticated and perpetuated* as directed, that is, duly proved and recorded as directed, the conveyance is declared not to be deemed *valid,* but to be *void* and of *no effect*. So important is this enactment, that from session to session of the Legislature, it is an invariable practice to pass a law enlarging the time for proving all such conveyances. If a *hiatus* occurs in the link of this chain of acts, and a subsequent act should be passed, the deed may be proved and authenticated under the latter, but when so proved and authenticated, it has no relation back; so that an execution against the bargainor may be levied upon the property contained in it. *Scales v. Fewell,* 10 N. C., 18."

In 12 C. J., 1097, the law on the subject of curative acts is summarized as follows: "Deeds, probates, or other instruments void because of lack of registration or defective registration may be made valid by subsequent legislation as between the parties, but not for the purpose of impairing rights acquired by third persons before the passage of the statute."

I think the act of 1924 is valid, and that, under it, the deed in question is good as between the parties. The fact that Mrs. George, in the meantime, had executed a will, devising the property to others, *ipso facto* vested no right in them, and cannot affect the present suit, for she was living at the time of the passage of the extending act, and under the law, as now written, a will speaks and takes effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. C. S., 4165.

STATE v. WILLIAM FOWLER.

(Filed 23 February, 1927.)

1. **Constitutional Law—Criminal Law—Punishment—Discrimination.**

   Under provisions of C. S., 3410, applying to all counties of the State, a violation of the prohibition law, upon conviction, is punishable in all counties of the State by fine or imprisonment, within the discretion of the trial judge, and a statute, applying only to five counties, making the punishment a fine only in certain instances, is in violation of our Constitution, and void. Const., Art. I, sec. 7.

2. **Same—Indictment—Judgment.**

   Where the indictment for the violation of our prohibition law is drawn under the provisions of C. S., 3410, and there is an existing statute applying to a county wherein the trial is had making the defendant in case of the first offense punishable only by a fine, and imprisonment for the second offense, and is void in the former instance, as to which the indictment would otherwise be defective, a sentence under the general statute is properly entered, upon conviction.

APPEAL by defendant from *Stack, J.,* at Spring Term, 1926, of POLK.

The defendant was indicted and convicted of having intoxicating liquor in his possession in violation of law. The General Assembly at the session of 1925 passed a Public-Local law applicable to the counties of Transylvania, Jackson, Clay, Graham and Polk. Public-Local Laws 1925, ch. 114. Section 1 provides that certain officers, charged with the duty of enforcing the criminal laws of the State, who shall produce evidence convicting any person of manufacturing liquor, selling, transporting, buying or having it on hand, etc., shall receive a reward of $25 to be paid by the person convicted, etc. Section 2: "That any person or persons who shall be convicted of any of the offenses hereinbefore mentioned (manufacturing, selling or offering for sale, transporting, buying, or having liquors on hand for the purpose of sale or any other violation of the prohibition law) shall be guilty of a misdemeanor and shall, for the first offense, be fined not less than fifty dollars nor more than one hundred dollars, and for a second or further similar offense shall be imprisoned not less than six months nor more than two years, and shall be required to pay all costs and sums taxed as a reward against such convicted person in addition to such fine or imprisonment as herein mentioned." The other sections are not material.

The indictment contains counts charging the defendant with the offenses enumerated. Upon conviction he was sentenced to imprisonment for six months to be worked on the public roads of Henderson County, and he appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Quinn, Hamrick & Harris for defendant.

ADAMS, J. For the first offense section 2 imposes a fine; for the second or further similar offense, imprisonment for a term not less than six months nor more than two years. The defendant admitted that he had previously been convicted in the Federal Court; and for this reason, according to a recital in the judgment, he was sentenced to imprisonment in the present case; but the aggravated punishment prescribed for a subsequent conviction cannot be imposed unless the prior conviction, which is an essential part of the description of the second offense, is charged in the indictment. C. S., 4617; *S. v. Davidson,* 124 N. C., 839; *S. v. Dunlap,* 159 N. C., 491; *S. v. Walker,* 179 N. C., 730; *S. v. Clark,* 183 N. C., 733.

The State contends, however, that under the general law any person who violates the provisions of the prohibition act may be fined or imprisoned or both fined and imprisoned in the discretion of the court (C. S., 3410); that the act of 1925 (Public-Local Laws, ch. 114), confers upon residents of the five counties to which it applies a privilege or immunity not enjoyed by other residents of the State; and that such privilege or immunity is inhibited by the organic law.

In theory constitutional government is based upon equality of rights, privileges and protection. The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws"; and, as said by *Mr. Justice Field,* these provisions intend "that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." *Barbier v. Connolly,* 113 U. S., 27, 28 L. Ed., 923. That the State Constitution rests upon the same theory is made obvious by reference to the Declaration of Rights. There are constitutions which provide in express terms that general laws shall have a uniform operation; ours embodies the principle in the following language: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Const., Art. I, sec. 7. This provision, we think, is a guaranty that every valid enactment of a general law applicable to the whole State shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions. 6 R. C. L., 369, sec. 364; 36 Cyc., 992; 12 C. J., 1187, sec. 955; 16 C. J., 1352, sec. 3189; *S. v. Bargus,* 53 A. S. R. (Ohio), 628; *Jones v. R. R.,* 121 A. S. R. (Ill.), 313; Cooley's Const. Lim., 554 *et seq.* A practical application of the provision in civil actions may be found in *Simonton v. Lanier,* 71 N. C., 498 and *Rowland v. B. & L. Asso.,* 116 N. C., 878, in which the purported grant of a right to charge more than the statutory rate of interest is condemned as an exclusive or separate privilege. *Elizabeth City v. Power Co.,* 188 N. C., 278.

This principle, it should be understood, was not designed to interfere and does not interfere with the police power of the State, the object of which is to promote the health, peace, morals and good order of the people, to increase the industries of the State, to develop its resources, and to add to its wealth and prosperity. *Barbier v. Connolly, supra*; 12 C. J., 1185, sec. 953. Legislation of this character is a necessity; but in the exercise of the police power classification must be natural, not arbitrary; it "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf Co. v. Ellis,* 165 U. S., 150, 41 L. Ed., 666; *Connolly v. Pipe Co.,* 184 U. S., 539, 559, 46 L. Ed., 679, 690; *Sutton v. State,* 33 L. R. A. (Tenn.), 589; *S. v. Joyner,* 81 N. C., 534; *S. v. Stovall,* 103 N. C., 416; *S. v. Moore,* 104 N. C., 714; *Broadfoot v. Fayetteville,* 121 N. C., 418. See, also, *Ex parte Schatz,* 38 A. L. R., 1032, 1035.

But the statute under consideration cannot be sustained on the ground that it was enacted in the exercise of the police power. The question is whether it shall supersede "the law of the land,"—the general public law which was designed to operate without exception or partiality throughout the State. It is needful to remember that the indictment was drafted under the general law, and that the decisive question is whether offenders in the five counties referred to may lawfully be exempted from the punishment prescribed by the general law; whether they shall be subject only to a fine when the offenders in ninety-five other counties may be punished by imprisonment. In our judgment this part of section 2 is neither equal protection of the laws nor the protection of equal laws (*Connolly v. Pipe Co., supra*); it is the grant of a special exemption from punishment or an exclusive or separate privilege which is forbidden by the cited provision. This conclusion is upheld in principle in our own decisions and in those of other jurisdictions. In the case of *William W. Jilz,* 3 Mo. Appeal R., 243, the Court said: "The general law applicable to the State prescribed as the punishment for the offense of which the petitioner was convicted, imprisonment in the county jail not exceeding one year, or a fine not exceeding $500, or both such fine and imprisonment. A law prescribing a different punishment from this in St. Louis County is clearly unconstitutional." At the special session of 1880 the General Assembly of North Carolina, enacted a statute applicable to twelve counties, purporting to make the killing or injury of livestock by a car or an engine a misdemeanor and providing that the engineer, the conductor, and the superintendent of the railroad should be indictable. The Code, 2327 *et seq.* The Court, holding that the act was unconstitutional, remarked: "We do not say, that there may not be local legislation, for it is very common in our statute books, but that an act divested of any peculiar circumstances, and *per se* made indictable, should be so throughout the State, as essential to that equality and uniformity which are fundamental conditions of all just and constitutional legislation." *S. v. Divine,* 98 N. C., 778. The principle of uniformity in the operation of a general law extends to the punishment and denounces as arbitrary and unreasonable the imposition in one county of any kind of punishment which is different from that which is prescribed under the general law to all who may be guilty of the same offense. It follows that the provision limiting the punishment for the first offense to a fine must be regarded as an arbitrary class distinction which cannot be sustained because forbidden by the fundamental law and the judgment which was pronounced by authority of the general law must be upheld. We find no reversible error.

No error.

BARNES DANIEL, ADMINISTRATOR C. T. A. OF NANCY DANIEL, v. CELIA BASS ET AL.

(Filed 2 March, 1927.)

1. **Wills—Devise—Rule in Shelley's Case—Remainders.**

   A devise to the sisters of the testator and their heirs forever, if any, if not to the heirs of certain other of the testator's sisters, to them and their assigns, forever, does not create a remainder or the semblance of a remainder, and is not within the rule in *Shelley's case.*

2. **Same—"Heirs"—Interpretation.**

   In a devise to a specified sister and brother of the testator's lands to them and their heirs forever, if any, if not to the heirs of certain other of the testator's brothers and sisters, the word "heirs" unexplained by other expressions of the will is to be construed in its technical sense as heirs who take as if by descent under the canons general, and not that of children, carrying the fee-simple title to the brother and sisters first named.

3. **Wills—Estates—Contingent and Springing Uses — Repugnance—Fee Limited After a Fee.**

   While under C. S., 1740, under the doctrine of contingent and springing uses (27 Henry VIII), a fee may be limited after a fee by devise of lands, there must have been created a supervening contingent event which may shorten the continuation of the estate granted in fee, and upon which the uses may operate, and otherwise a fee limited after a fee is repugnant and the limitation is void.

APPEAL by C. L. Rowe and other defendants from *Barnhill, J.,* at November Term, 1926, of WILSON.

Isaac Daniel had two brothers and seven sisters: John Daniel, Jacob Daniel, Nancy Daniel, Mahala Daniel, Celia Bass, Sallie Rowe, Delphia Daniel, Mary Jane Hathaway, and Harriet Tomlinson. The last two died in the lifetime of Isaac, leaving children; the others survived him. He died 1 April, 1926, leaving a will, the second item of which is as follows:

"I give and devise to my beloved sisters, Nancy Daniel and Mahala Daniel, equally, the tract or parcel of land I drew from my father's estate, containing 16 acres, known as the Josiah Daniel land, and all other property in my possession at my death, to them and their heirs forever, if any. If not, to the heirs of my sisters, Mary Jane Hathaway, Celia Bass, and Sallie Rowe, to them and their assigns forever."

His sister Nancy Daniel died 7 April, 1926, leaving a will, the second item being as follows:

"I give and devise to my beloved sister, Mahala Daniel, and brother, Isaac Daniel, equally the tract or parcel of land I drew from my father's estate, containing 16 acres, known as the Josiah Daniel land, and all other property in my possession at my death, to them and their heirs forever, if any. If not, to the heirs of my beloved sisters, Mary Jane Hathaway, Celia Bass, and Sallie Rowe, to them and their assigns forever."

The plaintiff's object in bringing suit was to get the advice of the court as to the construction of the wills and as to his duty in the administration of the estate. *Bank v. Alexander,* 188 N. C., 667. The defendants are the surviving brothers and sisters, the surviving children of Mary Jane Hathaway and Harriet Tomlinson, and the children of Celia Bass and Sallie Rowe. The appellants are Celia's and Sallie's children.

Isaac, Nancy, and Mahala lived together on a farm which they inherited from their father. On 28 September, 1905, each of them executed a will, the respective devises being almost identical, except as to the names of the devisees—Isaac naming Nancy and Mahala as his beneficiaries, Nancy naming Isaac and Mahala, and Mahala naming Isaac and Nancy. Neither Isaac nor Nancy ever married; Mahala married Barnes Daniel, the administrator, and is now living.

The appellants contend:

1. That the real property devised to Mahala Daniel and Nancy Daniel in the last will and testament of Isaac B. Daniel went to Mahala Daniel and Nancy Daniel for life only, with remainder to the heirs or children of Mary Jane Hathaway, Celia Bass, and Sallie Rowe.

2. That the personal property in the last will and testament of Isaac B. Daniel likewise went to Nancy Daniel and Mahala Daniel for life only, with remainder to the heirs or children of Mary Jane Hathaway, Celia Bass, and Sallie Rowe.

3. That the devise to Mahala Daniel in the last will and testament of Nancy Daniel, of one-half of her individual real estate, went to Mahala Daniel for life, with remainder in the event of Mahala Daniel's death without issue to the heirs or children of Mary Jane Hathaway, Celia Bass, and Sallie Rowe.

4. That the personalty bequeathed in the will of Nancy Daniel to Mahala Daniel went to Mahala Daniel for life, and in the event that Mahala Daniel died without issue, with remainder to the heirs of or children of Mary Jane Hathaway, Celia Bass, and Sallie Rowe.

5. That the devise in the last will and testament of Nancy Daniel to her brother, Isaac B. Daniel, who predeceased her, lapsed, and both the real and personal property contained in that devise went to the distributees or next of kin generally of Nancy Daniel.

Mahala Daniel, appellee, submits four theses:

1. That under the rule in *Shelley's case* Mahala Daniel takes a fee-simple and absolute estate in the entire property.

2. That under the rule in *Wild's case* Mahala Daniel takes a fee-simple and absolute estate in the entire property.

3. The gift to the first taker being absolute in its character, if it should be construed that there is a gift over, that such gift over is void because of repugnancy.

4. If it should be held that there was a contingent limitation, the death of the testator was the proper time to determine when the fee-simple and absolute estate should vest.

His Honor adjudged:

1. That Mahala Daniel is the owner in fee of all the property, real and personal, of which Isaac Daniel and Nancy Daniel died seized and possessed.

2. That the administrator, out of the personal estate, pay the debts of Isaac and Nancy, respectively, etc.

C. L. Rowe and other defendants excepted and appealed.

Connor & Hill for plaintiff.

Woodard & Rand and Brooks, Parker, Smith & Hayes for Mahala Daniel.

Lucas, Barnes & Jennings for appellants.

ADAMS, J. With the exception of the devisees therein named, the second item in each of the three wills is substantially the same, and as Isaac Daniel predeceased his two sisters, we may first consider the words in which he expressed his devise: "To my beloved sisters, Nancy Daniel and Mahala Daniel, . . . to them and their heirs forever, if any. If not, to the heirs of my sisters, Mary Jane Hathaway, Celia Bass, and Sallie Rowe, to them and their assigns forever."

It may be said, in the first place, that the devise is not within the scope or provisions of the rule in *Shelley's case.* In Coke's definition of the rule the word "remainder" does not appear (1 Coke, 104), but in Preston's it does: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and afterwards in the same deed, will or writing there is a limitation by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally or his heirs of his body by that name in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession, from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation." 1 Preston on Estate, 263, *et seq.* This language was abridged by *Chancellor Kent* as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent's Com., 215.

The doctrine that a remainder, or the "similitude of a remainder," is an element essential to the rule has been approved in numerous decisions, including *Jones v. Whichard,* 163 N. C., 241; *Reid v. Neal,* 182 N. C., 192; *Willis v. Trust Co.,* 183 N. C., 267; *Hampton v. Griggs,* 184 N. C., 13; *Shephard v. Horton,* 188 N. C., 787; *Benton v. Baucom,* 192 N. C., 630. See, also, *Hamilton v. Sidwell,* 29 L. R. A. (N. S.), 961, and annotation, 973. In the wills under consideration, neither devise creates a remainder, or reflects the semblance of a remainder, and the rule in *Shelley's case* is excluded.

We are likewise of opinion that *Wild's case* has no application. 6 Coke, 16b; 77 Eng. Reports, 277. There the special verdict was to this effect: Land was devised to A. for life, the remainder to B. and the heirs of his body, the remainder to "Rowland Wild and his wife, and after their decease, to their children," Rowland and his wife then having issue, a son and daughter; afterwards the devisor died; and after his decease A. died; B. died without issue; Rowland and his wife died, and the son had issue, a daughter, and died. Whether the daughter should have the land was the question; and it consisted only upon the consideration what estate Rowland Wild and his wife had—whether they had an estate tail or an estate for life, with remainder to their children for life. It was resolved that Rowland and his wife had but an estate for life, with remainder to their children for life, and no estate tail; that the devisor's intent, not his words only, ought to make an estate tail; and that no such intent appeared. Therefore, this difference was resolved for good law: "If A. devises his lands to B. and his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issue should take, and as immediate devisees they cannot take, because they are not in *rerum natura,* and by way of remainder they cannot take, for that was not his intent. . . . But if a man devises land to A. and to his children or issue, and they then have issue of their bodies, . . . they shall have but a joint estate."

Illustrations of this rule and instances of its practical application may be seen by reference to a course of decisions beginning with *Moore v. Leach,* 50 N. C., 88, and continuing in an unbroken line to *Boyd v. Campbell,* 192 N. C., 398. But we find nothing in either will which attracts this principle. It is evident that "heirs" in the clause "to them and their heirs forever" is not synonymous with "children"; the word as used by the devisors means "the heirs designated by the law to take from their ancestors." *Wool v. Fleetwood,* 136 N. C., 460, 469.

But the third proposition advanced by Mahala Daniel is not without merit—that is, under each devise the first taker acquired a fee, and the purported limitation over is void for repugnancy. This, of course, is inconsistent with the appellants' position that Nancy and Mahala took only a life estate, with remainder to the designated children, and that under Nancy's will Mahala took a half-interest for life, with such remainder in the event of her death without issue.

The word "heir" has a technical meaning, and must ordinarily be interpreted according to its technical sense. At common law it signifies a person who succeeds by descent to real estate upon the death of his ancestor. True, the meaning may be explained or controlled by the context, but there is nothing in either will which requires or permits the application of this doctrine. In the expression "to them and their heirs forever" the word "heirs" must be given its technical meaning. *Wool v. Fleetwood, supra.* The result is that under Isaac's devise of his property to Nancy and Mahala equally, "to them and their heirs forever," the devisees took an estate in fee as tenants in common; and the additional words, "if any," do not change the quantity of the estate. The devise of a fee, "if any," is still the devise of a fee. These words can appropriately be considered only as related to the succeeding clause: "If not, to the heirs of my sisters," etc. The appellants say that the fee, if acquired by the first taker, was subject to the asserted limitation, and therefore defeasible.

At common law a freehold could not be transferred without livery of seizin, and for this reason a fee could not be limited after a fee; but after 27 Henry VIII (C. S., 1740) was enacted, the doctrine of springing and shifting uses arose, by virtue of which a fee may be limited after a fee by deed or will. *Smith v. Brisson,* 90 N. C., 284; *Willis v. Trust Co., supra.* But there can be no limitation of a fee after a fee unless there be some contingency which defeats the estate of the first taker. The prior estate may be a fee defeasible or determinable by the contingency on which it is limited; but such supervening contingency is essential, and it must operate to defeat, abridge, or cut down the prior estate in order to make room for the limitation. *McDaniel v. McDaniel,* 58 N. C., 351; *Boyd v. Campbell, supra.*

In the wills under consideration, we discover no such contingency. There is no limitation over in the event of the first taker's death without children or issue; and herein, if in no other respect, the devise differs from that in *Massengill v. Abell,* 192 N. C., 241. The intent to which we must give heed is not that which the testator may have had in mind if at variance with the obvious meaning of his words, but that which is expressed in the language he has used. *McIver v. McKinney,* 184 N. C., 393; *Gordon v. Ehringhaus,* 190 N. C., 147. By devising a fee in the first clause, the testator parted with his entire interest and could not destroy the devised estate by means of a totally repugnant clause. The principle, which in the case before us applies to the testator's real and personal property, is stated in *Newland v. Newland,* 46 N. C., 463, 467: "If a devise be to A. and his heirs, and if he dies without heirs, then to B., the remainder is repugnant to the estate in fee, and void." *Roane v. Robinson,* 189 N. C., 628; *Carroll v. Herring,* 180 N. C., 369; *Hall v. Robinson,* 56 N. C., 348.

The trial court erred, however, in adjudging that Mahala Daniel is the owner in fee of all the property and estate of which Isaac and Nancy died seized and possessed. Upon the death of Isaac Daniel, his entire estate vested in Nancy and Mahala as joint owners, but as Isaac predeceased Nancy, the interest which he would have taken under Nancy's will had he survived her lapsed, and in the absence of a residuary clause, the real and personal property given to him vests in Nancy's heirs at law and distributees, there being no provision for survivorship, as in *Kornegay v. Cunningham,* 174 N. C., 209, and similar cases. *Johnson v. Johnson,* 38 N. C., 426; *Winston v. Webb,* 62 N. C., 1; *Robinson v. McIver,* 63 N. C., 645; *Twitty v. Martin,* 90 N. C., 643; *Reid v. Neal, supra.*

As thus modified the judgment is affirmed.

Modified and affirmed.

GARLAND POLSON, THROUGH HIS NEXT FRIEND, G. L. POLSON, v. J. M. STRICKLAND, THE TEXAS OIL COMPANY, A CORPORATION, AND E. V. CARTER.

(Filed 2 March, 1927.)

Claim and Delivery — Judgments — Damages — Motion to Reinstate — Pleadings.

While the successful plaintiff in claim and delivery is entitled to recover the property when it can be returned, together with damages for its depreciation, C. S., 836, after a judgment for the delivery of the property

alone, a motion to reinstate the action for the purpose of inquiry as to damages for its depreciation cannot be allowed when the pleadings and evidence sustain the issues submitted upon which the judgment has been rendered, the judgment in that case being final and not interlocutory.

APPEAL by defendants from *Grady, J.*, at October Term, 1926, of NASH. Reversed.

The necessary facts will be set forth in the opinion.

J. A. Edgerton and Thorne & Thorne for plaintiff.
E. B. Grantham and Cooley & Bone for defendants.

CLARKSON, J. This was an action to recover of defendants a Ford automobile. The ancillary proceeding or provisional remedy of claim and delivery was resorted to, and the Ford automobile seized, and defendants gave replevin or undertaking as required by the statute. C. S., 836.

Plaintiff prayed, in substance, that he be declared the owner and entitled to the immediate possession of a Ford car, describing it, and that he recover of the defendants J. M. Strickland and the Texas Oil Company, and their surety, M. J. Hedrick, the cost of this action, to be taxed by the clerk; but if for any reason the possession of the said Ford car cannot be had, then the plaintiff prays the court for judgment against the said parties in the amount of $250, together with the cost, etc., and for such other and further relief as the plaintiff is entitled.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Is the plaintiff, Garland Polson, the owner of the Ford car, as alleged in the complaint? Answer: 'Yes.'

"2. What is the value of the car? Answer: '$250.' "

These were the material issues raised by the pleadings and prayers of plaintiff.

A judgment was rendered on the verdict, February Term, 1926: "That the plaintiff recover of the defendants the Ford automobile described in the pleadings, and in the event actual delivery of said automobile cannot be made to the plaintiff, then plaintiff shall have and recover of the defendants and M. J. Hedrick, surety on their replevin bond, the value thereof, $250, and the costs of this action." It may be noted that M. J. Hedrick was not made a party to the action.

At October Term, 1926, the plaintiff made a motion that the action be reinstated on the docket of the court, and an issue as to damages for the deterioration and detention of the car be submitted to the jury—the facts in respect of the damages to the property not being known to the plaintiff in the action; and the fact of the damages becoming known to the plaintiff only after execution issued on the judgment for the possession of the property, and the property placed in the hands of the plaintiff, when he had his first chance to know the fact of damage by reason of deterioration and detention.

Defendants contend that plaintiff's position is untenable; that final judgment had already been rendered, based upon the issues submitted at the trial by the court, without objection upon the part of the plaintiff, and the case had gone off the docket.

The plaintiff could have retained the action on the docket to determine "if delivery can be had, what were plaintiff's damages for deterioration and detention." C. S., 836; *Moore v. Edwards,* 192 N. C., p. 446. This aspect was entirely overlooked and judgment was for the recovery of the Ford automobile, or its value and costs. See *Trust Co. v. Hayes,* 191 N. C., p. 543, as to form of judgment in claim and delivery proceeding. C. S., 610.

"A judgment is either interlocutory or *the final determination* of the rights of the parties in the action." C. S., 592.

A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them, and does not include matters which might have been brought in, but which were not joined or embraced in the pleadings.

The judgment is final in the present action, in so far as the pleadings and issues are determinative of the facts in dispute. The court below was without power to make the order to reinstate on the trial docket. C. S., 600, allows a judgment, within one year after notice thereof, to be set aside for mistake, inadvertence, surprise, or excusable neglect. See *Foster v. Allison Corp.,* 191 N. C., p. 166; 44 A. L. R., p. 610.

It may be noted that where a separate action was instituted under similar facts as here, we said, in *Moore v. Edwards, supra,* at pp. 448-449: "We can find no statutory provision prohibiting separate actions in a case of this kind. It is, no doubt, better practice to try out the entire controversy in one action. . . . It will readily be seen by the issues and judgment in the former action of *Moore v. Mitchell* that plenary issues were not submitted. The condition in the bond was 'with damages for its deterioration and detention, and the cost, if delivery can be had.' No issue was submitted, 'If delivery can be had, what were plaintiff's damages for deterioration and detention?' Under the issues and judgment, we cannot hold that in the present action the plea of estoppel or *res judicata* can avail defendant." *McInturff v. Gahagan, ante,* p. 147.

For the reasons given, the judgment below is

Reversed.

STATE v. MOSES GREEN.

(Filed 2 March, 1927.)

Evidence—Declarations—Hearsay—Appeal and Error—Prejudice.

Where the evidence upon trial for murder is that two men went together to the store of deceased, one waited at the door and the other entered and assumed to purchase merchandise from the deceased, and shot and killed him without warning, declarations by one of them in whose favor a verdict of not guilty was directed, not made in the presence of the other, identifying the other as the guilty one, are incompetent as hearsay evidence, and their admission as evidence constitutes prejudicial and reversible error.

Appeal by defendant from *Grady, J.*, at September Term, 1926, of Wilson.

Criminal prosecution, tried upon an indictment charging the prisoner with a capital felony, to wit, murder in the first degree.

From an adverse verdict, and sentence of death entered thereon, the prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Hugh Dortch and Bryce Little for defendant.

Stacy, C. J. There is evidence on behalf of the State tending to show that about ten o'clock on the night of 15 May, 1926, Moses Green and Leroy Wingate, two colored men, went to the store of one David Peele, a merchant at Aycock's Crossing, in Wilson County, and entered his place of business ostensibly for the purpose of making a purchase of a shirt and a pair of pants. Wingate stood at the door while Green went into the store, though the State's witness was somewhat equivocal as to which one entered the store and which one stood at the door. A shirt was selected and a pair of pants examined, but the latter did not prove satisfactory. As the merchant turned to wrap up the shirt, the prisoner, Moses Green, whipped out his pistol, shot Peele just above the heart and killed him almost instantly. No warning was given by the prisoner of his purpose prior to the shooting, and both colored men left the store immediately.

During the time Green and Wingate were in jail awaiting trial, both made statements to the sheriff, in the absence of each other, as to how the homicide occurred, each contending that the other did the shooting. All the evidence was to the effect that the one who entered the store, whether Green or Wingate, and not the one who remained at the door, shot the deceased.

At the close of the evidence, a verdict of "Not guilty" was directed in favor of the defendant Leroy Wingate.

With respect to the following statement made by Wingate to the sheriff and his deputy, while in jail, the prisoner, Moses Green, duly objected, and asked that it be excluded as evidence against him.

The officer testified: "He (Wingate) said that Green went into the store and called for a shirt, a blue shirt with a collar, and also a pair of pants; that he couldn't find any pants to suit him, but said he would take the shirt, and asked the man to wrap it up; that he (Wingate) called Green and said 'Let's go,' and when he looked, Green pulled his pistol out and fired; that he (Wingate) ran, and never saw Green any more until they brought him up to the jail."

This evidence was incompetent as against the prisoner, Moses Green, and should have been excluded as to him. It was highly prejudicial, we think, in view of the uncertainty of the State's witness as to which one of the defendants entered the store and did the shooting. Also, it would seem, that the prejudicial effect of the statement was accentuated by the court's action in directing a verdict of not guilty as to Leroy Wingate.

It is a rule, too firmly established to admit of debate, that the declaration of a third person, not an agent of the party sought to be affected, made in the absence of such party, is inadmissible as hearsay. *Daniel v. Dixon,* 161 N. C., 377; *Redman v. Roberts,* 23 N. C., 479. *Res inter alios acta alteri nocere non debet.* "Things done between strangers ought not to injure those who are not parties to them." Co. Litt., 132; McKelvey on Evidence, pp. 129 and 203.

Speaking to the question in *S. v. Lassiter,* 191 N. C., 210, *Brogden, J.,* delivering the opinion of the Court, said: "The inherent vice of hearsay testimony consists in the fact that it derives its value, not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information." This is the general rule, supported by all the authorities on the subject. There are, of course, exceptions to the rule, not now necessary to be considered, as the evidence here complained of falls under none of them.

For the error, as indicated, there must be a new trial; and it is so ordered.

New trial.

STATE v. JOHN K. HARTLEY.

(Filed 2 March, 1927.)

1. **Courts—Recorders' Courts—County Commissioners — Appointment of Substitute Recorder—Coram Non Judice.**

Where a substitute recorder of the county court is elected by the county commissioners under statutory authority providing that it may be so done when the recorder is absent from the county or unable to perform the duties of the court, the former may hear and determine a criminal case coming within the jurisdiction of the court when the latter refuses to act upon the ground that he is related by blood to the prosecuting witness, and objection that the prosecution was *coram non judice* is untenable, and a writ of *certiorari* in *habeas corpus* proceedings will be denied in the Supreme Court, when the motion is based on this ground alone.

2. **Criminal Law—Libel—Warrant—Indictment.**

Held, objection that warrant in this case was not sufficient to charge a criminal offense untenable.

PETITION for *certiorari*, in lieu of appeal, to review judgment of *Cranmer, J.*, rendered 22 October, 1926, at Goldsboro, on return to writ of *habeas corpus*, refusing to discharge the petitioner from custody.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Abell & Shepard, Wellons & Wellons, and F. H. Brooks for defendant.

STACY, C. J. The material allegations, upon which the petitioner bases his application for a writ of *certiorari*, are as follows:

1. That he was tried in the recorder's court of Johnston County, before James Raynor, Esq., substitute recorder, on 20 October, 1926, convicted of criminal libel, and sentenced to thirty days in jail, etc.

2. That the said James Raynor was elected substitute recorder on 19 October, 1926, for the remainder of the term of the duly elected recorder, Ezra Parker, under and by virtue of authority vested in the board of county commissioners of Johnston County by chapter 269, Public-Local Laws 1911, as amended by chapter 554, Public-Local Laws 1921, said amendment, in so far as material, being as follows: "The said board of county commissioners may elect a substitute recorder, who shall act as recorder during the absence from the county of the recorder mentioned herein, or at any time when he is unable to perform said duties, and at such times shall exercise all the powers of recorder and be subject to the same rules and requirements imposed upon the recorder."

3. That on 20 October, 1926, the duly elected recorder of Johnston County, Ezra Parker, was present in the county and able to perform his duties, but declined to try the petitioner because of his relationship by blood, brother, to the prosecuting witness, against whom the libel is alleged to have been published.

4. That the warrant upon which the petitioner was tried is defective, in that it fails to charge a criminal offense.

Upon these, the allegations chiefly pertinent, the petitioner contends that the judgment against him is void, in that the prosecution was *coram non judice,* and the warrant, upon which he was tried, failed to charge any offense against the criminal law of the State.

The first ground upon which the petitioner assails the validity of the judgment, to wit, that the prosecution was *coram non judice,* is untenable. 33 C. J., 1005. A correct sense of propriety and a due regard for the eternal fitness of things ought not to be held for unrighteousness on the record now before us. It was not unlawful for the recorder to recuse himself under the circumstances here disclosed. *Turney v. Ohio,* 71 L. Ed., decided 7 March, 1927. There is a modicum of truth in the couplet:

"If self the wavering balance shake,
It's rarely right adjusted."—*Burns.*

The second ground of assault upon the judgment, that the warrant fails to charge any criminal offense, is without merit, on the record as presented. *S. v. Edwards,* 192 N. C., 321.

His Honor properly refused to discharge the petitioner from custody. The application for writ of *certiorari* is denied.

Certiorari disallowed.

G. W. WRIGHT AND WIFE, AMY S. WRIGHT, v. PHILLIPS FERTILIZER COMPANY ET AL.

(Filed 2 March, 1927.)

1. **Corporations—Minutes of Meeting—Directors—Estoppel.**

Where a director of a corporation has attended a meeting at which by resolution he has written himself, properly passed, his monthly salary has been fixed in a certain sum for the period of a year, and he has continued his employment thereunder without objection, he is by his acquiescence estopped to deny that the salary so fixed for the period stated in the ordinance was for a period of five years, and after several years maintain his action to recover the difference for that period and the smaller sum he has continued thereafter to draw.

2. Same—Mismanagement—"Surplus Fund."

Where a director of a corporation has acquiesced in a resolution drawn by himself, properly passed and recorded, providing for the issuance of preferred stock to cover a loss alleged to have been sustained by mismanagement of the former officers or directors of the corporation, he is estopped to recover his proportionate part of the alleged loss.

3. Same—Parol Evidence.

The principle that the written minutes of the meetings of a board of directors of a corporation may be corrected by parol evidence to speak the truth, does not apply when a member of the board is estopped by his acts and conduct in giving assent to the resolution in question.

CIVIL ACTION, before *Nunn, J.*, at October Term, 1926, of BEAUFORT.

The defendant, Phillips Fertilizer Company, was organized in 1915. At the time of the organization of the company the stockholders were George A. Phillips, Fenner T. Phillips and Amy S. Wright. The plaintiff, George W. Wright, acted as proxy for his wife at all meetings of the directors and stockholders. The plaintiff, George W. Wright, was a nephew of the other stockholders, G. A. Phillips and Fenner T. Phillips, and was employed by the company upon its incorporation. At the annual meeting of the directors of the company on 2 January, 1917, the minutes show that on motion, duly adopted, G. W. Wright was to be paid a salary of $1,500 for the year 1917. At a meeting, held on Tuesday, 8 January, 1918, the minutes show: "On motion, duly seconded, it was ordered that G. W. Wright be paid a salary of $2,500 for the year 1918." At the meeting of the directors on 7 January, 1919, the minutes show that: "It was ordered that George W. Wright be paid a salary of $5,000 for the year 1919." At a stockholders' meeting held on 6 January, 1920, there was an increase of the capital stock, and G. W. Wright subscribed for forty shares thereof. The minutes of this meeting further disclosed that the plaintiff, G. W. Wright, was elected vice-president of the company; and, further, that "on motion, duly seconded, it was ordered that G. W. Wright be paid a salary of $6,500 for the year 1920."

The by-laws of the company provided that directors should be elected and officers should be elected for the term of one year and until their successors shall have been elected and qualified, and further, that "all directors, officers and employees in accepting position or employment shall be understood to agree that they may be dismissed in this manner (that is, by a vote of two-thirds in number of all the directors). When a director, officer or employee shall be discharged in the manner prescribed herein, he shall have . . . no claim for services after the date of his discharge."

The plaintiff was paid his salary upon a basis of $6,500 per year until on or about 4 November, 1920. G. A. Phillips, who was the owner of about two hundred shares of the capital stock, and who was the financial support of the company, became heavily involved as an endorser for the company. In the fall of 1920 he was bound upon approximately $135,000 of the company's liabilities. The cost of material had declined during the year 1920, and the company was facing a tremendous loss by reason of business depression. G. A. Phillips sold his interest in the corporation to the defendants, Flynn, Leach and Winslow. Phillips had advanced to the company from time to time about $69,000, and this was set up on the books of the company as a surplus, although the company owed this amount to Phillips for advances so made by him from time to time. In the sale of his stock to Winslow and others Phillips also sold his interest in this so-called surplus account. Plaintiff contended that $5,000 of this surplus account was borrowed by Phillips from the Eureka Lumber Company and loaned to the defendant corporation, and that, when Flynn, Leach and Winslow bought the stock of Phillips, they should have assumed payment of this $5,000 indebtedness; whereas, as a matter of fact, it was paid from the assets of the corporation, and the plaintiffs, therefore, contend that, as they were the owners of one-fifth of the stock, the payment of this $5,000 indebtedness to the Eureka Lumber Company constituted a diversion of the funds of the corporation, and that the plaintiff should be entitled to one-fifth of that amount, to wit, the sum of $1,000.

One of the creditors of the corporation, to wit, A. F. Pringle, Inc., brought a suit in the Federal Court in 1921 against Flynn, Leach and Winslow, F. T. Phillips, plaintiff, G. W. Wright, and G. A. Phillips. In paragraph fourteen of the complaint in said action it was alleged: "That there is grave and serious dissension among the stockholders and directors of said corporation, seriously affecting the proper carrying on of the business of the corporation and the preservation of its assets. . . . And these complainants further allege that if the assets which properly belong to the said corporation which the said Flynn, Leach and Winslow have diverted and tortiously taken for their own use and are attempting wrongfully to convert and take to their own use, are restored to the corporation and the further diversion thereof prevented, that the said corporation would be solvent . . . but that if the said Flynn, Leach and Winslow are not restrained by this honorable court and are permitted to sell said cotton and convert the other assets claimed by them as their individual property, . . . though belonging to the said corporation, and are not compelled to restore the moneys and assets of the corporation which have already wrongfully been used, that then the company will be insolvent."

In paragraph fifteen of said petition or complaint it was alleged in substance that the defendants, Flynn, Leach and Winslow, were taking the assets of the company held by them as directors in trust for the benefit of creditors and applying the same to the liquidation of their individual liability assumed by them at the time the said stock was taken over from G. A. Phillips.

The plaintiff, Wright, and F. T. Phillips, answering the petition, admitted the allegations contained in paragraph fourteen of the petition, and further alleged "that there are grave, serious and fundamental dissensions between the stockholders of the Phillips Fertilizer Company and the defendants, G. W. Wright and F. T. Phillips, and their associates. After a hearing in Wilson before *Hon. H. G. Connor,* U. S. District Judge, the action brought by Pringle, Inc., was dismissed by a decree containing this declaration: "And it further appearing to the Court that all matters under controversy between and among the plaintiff and the defendants have been compromised and adjusted to the mutual satisfaction of all parties, it is ordered and decreed that this action be dismissed at plaintiff's cost." Thereafter, at a meeting of the stockholders of the company, it was ordered that settlement be made with Pringle, Inc., in accordance with the judgment of *H. G. Connor,* District Judge. At the same meeting it was ordered that $60,000 preferred stock be issued, of which amount $5,000 was to be issued to A. F. Pringle, Inc., and $55,000 to Flynn, Leach and Winslow. The minutes of this meeting were signed by G. W. Wright, who is plaintiff in this action. This issue of preferred stock was to cover the surplus account above referred to.

In November, 1920, after business depression had set in the company paid the plaintiff $150 a month until on or about January, 1922, when he was paid $175 per month, and was discharged in March, 1923.

The plaintiff asserts that in December, 1919, the Phillips Fertilizer Company employed him for a period of five years, commencing 1 January, 1920, at a salary of $6,500 a year, and that he was paid at this rate until November, 1920, when the payments to him were reduced to $1,800 a year, and afterwards increased to $2,100 per year, and he brings suit for the sum of $7,870.77, balance due on salary and for the further sum of $1,000, same being one-fifth of the so-called surplus account involved in the Eureka Lumber Company transaction, and for the further sum of $804.58 for interest paid on notes for stock in the corporation.

At the conclusion of plaintiff's evidence there was judgment of nonsuit, and from this judgment the plaintiff appealed.

Wiley C. Rodman for plaintiff.

Small, MacLean & Rodman and Ward & Grimes for defendants.

BROGDEN, J. Two questions of law are presented upon the record:

1. Is the plaintiff estopped from asserting his claim for salary under the facts of this case?

2. Is the judgment of the District Court *res adjudicata?*

The plaintiff alleges that in December, 1919, at a regular meeting of the directors of the corporation, he was employed for a period of five years at a salary of $5,000 a year. The minutes of the corporation, however, for that meeting declare that it was "ordered that Geo. W. Wright be paid a salary of $5,000 for the year 1919." The plaintiff, George W. Wright, who wrote the minutes of the meeting, testified: "I put down what they said; I didn't say anything to the contrary; I already had an understanding; I didn't have anything to say about it. I wrote it down as they fixed it. I was at the meeting and wrote down the minutes as passed at that meeting. There were no written records of the transaction of that meeting except the minutes. I kept the minutes."

At the meeting of the directors of the company, held on 6 January, 1920, the following entry appears: "On motion, duly seconded, it was ordered that G. W. Wright be paid a salary of $6,500 for the year 1920." In regard to this entry in the minutes, plaintiff testified: "I prepared the minutes of the meeting on 6 January, 1920, when my salary was fixed at $6,500 for the year 1920. It was done according to custom. I wrote the record of the minute book, and Fenner Phillips signed it as secretary. I drew that salary for ten months of 1920. I drew like I always did. Some of it was paid in paper. For the remaining two months they paid me $150. It was paid at a different rate after October, 1920. I drew out all that was allowed me. I took what they gave me. . . . Up to November, 1920, I think all the records in the minute book were written by me, except the signatures of Fenner T. Phillips."

From this testimony of the plaintiff it is apparent that the minutes of the corporation, prepared by the plaintiff, show that the salary of $6,500 was confined to the year 1920. He is now claiming in this action the balance of his salary at $6,500 per year subsequent to 1920. It is a well settled principle of law that a failure to enter a resolution of the stockholders of a corporation on its minute book at the time it was adopted does not affect its validity. Such corporate acts can be proved by parol testimony where they are not recorded. *Bailey v. Hassell,* 184 N. C., 458; *Everett v. Staton,* 192 N. C., 216.

However, the question presented here is not whether the proceedings of the meetings can be established by parol evidence, but whether or not the minutes as written by the plaintiff himself estop him from claiming an amount in excess of that specified in the written record. On 6 January, 1920, when the meeting was held, the plaintiff was vice-president of the corporation and participated in that meeting and wrote the minutes thereof. "It is well understood that a stockholder in a private corporation is bound by a corporate resolution regularly passed in accordance with its charter and by-laws, and although attended with some irregularities a member who is present when a measure is formally passed and votes for the same, or fails to make protest, is ordinarily concluded." *Hoke, J.*, in *Meisenheimer v. Alexander,* 162 N. C., 227; *Winstead v. Hearne,* 173 N. C., 606.

If the plaintiff had a valid contract with the corporation for five years service, it was his duty to give notice of his contentions and not wait until the corporation passed into the hands of other parties, and after a lapse of four years to assert in court a claim for services in excess of the amount specified in the resolution by the directors in a meeting in which he participated. After November, 1920, the plaintiff was paid the sum of $150 a month. He made no protest, but accepted this small payment, and when asked about the matter, replied: "I will take what they give me, but I will contend for what they owe me." After plaintiff's salary was increased to $175 per month, and until his discharge in 1923, the record does not disclose that he made any protest or gave any notice whatever to the corporation as to his contention that he had a five-year contract for $6,500 per year.

The principle applicable to this state of facts is thus declared in *Hill v. R. R.,* 143 N. C., 557: "It is a general rule of law, as well as of good morals and fair dealing, that if a party is silent when he should speak or supine when he should act, he will not afterwards be permitted to either speak when he should be silent or to act when he has failed to do so at the first proper and opportune moment."

Applying these principles of law to the facts appearing upon the record, we hold that the plaintiff cannot now be heard to claim this excess salary.

The same principles of law control the rights of plaintiff with respect to his claim for one-fifth of the so-called surplus account. After the suit with Pringle had been settled, the plaintiff participated in a corporate meeting held on 7 January, 1922, and acted as secretary of the meeting, and, as such, recorded the minutes thereof. The minutes show that preferred stock was issued to Flynn, Leach and Winslow for $55,000 by reason of the so-called surplus account. The plaintiff made no protest until the suit was brought in January, 1925, and he cannot now be heard to attack this transaction. *Winstead v. Hearne, supra; Meisenheimer v. Alexander, supra.*

It is not necessary to decide whether or not the decree of the Federal Court operated as an estoppel by judgment. The pleadings apparently are broad enough to have such effect, but, as we hold that the plaintiff is estopped upon the facts and principles of law heretofore declared, it would be useless to discuss the effect of the decree of *Judge Connor.*

The judgment as rendered is

Affirmed.

JAMES E. CRAVEN v. EFFIE CRAVEN CAVINESS.

(Filed 2 March, 1927.)

Wills—Devise—Election—Estoppel.

One claiming lands under a will is put to his election to take the tract described in the will, and is estopped from claiming independently a part of the lands devised to another beneficiary.

APPEAL by plaintiff from *Cranmer, J.*, at July Term, 1926, of LEE. Affirmed.

This was an action brought by plaintiff against defendant for the recovery of a tract of land and to remove cloud upon plaintiff's title. Defendant pleads sole seizin and says, in part: That she is the owner in fee simple and in the possession of a tract of 90 acres of land lying in Pocket Township, Lee County, North Carolina, on the waters of Governor's Creek, and which is fully described by metes and bounds in the will of Eli A. Craven, deceased, and is therein devised to her; that she is the grand-daughter of testator and the Effa Jane (Craven) therein referred to, and said land is further delineated upon a map attached to the original of said will as "The Effa Tract." She denies that plaintiff is the owner thereof, or has any interest therein, but admits that the plaintiff, James E. Craven, takes the interest devised to him by the said will in the lands described therein in the item making a devise to him, and which are likewise delineated upon said map hereinbefore referred to; and this defendant disclaims title to the lands therein described and devised to James E. Craven, reference being made to the description in said will and said map for the boundaries of said land so devised to James E. Craven, etc.

Defendant further pleads estoppel that both plaintiff and defendant took under the will of Eli A. Craven. "There was devised to the plaintiff James E. Craven, as therein set out, the interest which he holds in two tracts of land fully described in said will, and under the said will the said James E. Craven was also bequeathed and devised certain other rights and benefits and things of value; that the said two tracts of land are the lands described in plaintiff's complaint, other than the 90 acres of defendant, which she is advised he has attempted to include in said description." That the will of Eli A. Craven was regularly probated in solemn form and plaintiff and defendant were parties to the proceeding. "The said will and every part thereof was established as the last will and testament of Eli A. Craven, deceased, and upon appeal to the Supreme Court of North Carolina the judgment sustaining said will was affirmed." That plaintiff has elected to take possession of the property under the will and is bound thereby and estopped to claim title to the 90 acres devised to defendant and such election is a bar to this action. Certain statutes of limitation are also pleaded; and, further, that plaintiff claims adverse to defendant, which is a cloud on defendant's title, etc.

The following judgment was rendered by the court below: "This cause being regularly reached upon the trial calendar, and being heard upon motion of Effie Craven Caviness for a judgment on the pleadings, as to the 90 acres of land described in the third paragraph of the will of Eli A. Craven, and it appearing that Eli A. Craven in said paragraph devised said 90 acres to said Effie Craven, now Effie Craven Caviness, and by the same will devised and bequeathed things of value to the plaintiff, James E. Craven, who has received and is enjoying the same, said facts appearing from the pleadings, upon motion of Effie Craven Caviness, it is decreed, ordered and adjudged: That the plaintiff, James E. Craven, is not the owner and has no interest in the 90 acres described in the third paragraph of the will of Eli A. Craven; that Effie Craven Caviness is the owner thereof; that the grantees and mortgagees mentioned in the supplemental answer of Effie Craven Caviness, taking and claiming under James E. Craven, have no interest therein, and that the said conveyance and mortgages therein mentioned and set out be canceled of record as clouds on the title of Effie Craven Caviness; that the said James E. Craven and his said grantees be, and they are perpetually restrained and enjoined from trespassing on said 90 acres, and that the plaintiffs James E. Craven and his said grantees as aforesaid claiming under him pay the costs of this action, to be taxed by the clerk."

Seawell & McPherson for plaintiff.
Hoyle & Hoyle for defendant.

PER CURIAM. The question of the validity of a codicil to the will of Eli A. Craven was here upon appeal of caveators. This Court affirmed the judgment of the court below, declaring the will and codicil to be valid. *In re Craven,* 169 N. C., p. 561.

From a careful consideration of the facts as admitted of record, we think that the principle both of election and estoppel apply. This is a conclusion of law. Plaintiff was *sui juris.*

In *Elmore v. Byrd,* 180 N. C., p. 120, *Walker, J.,* fully sets forth in an exhaustive opinion concerning the principle of the doctrine of election.

In *Cook v. Sink,* 190 N. C., at p. 625-6, it is said: "They cannot 'blow hot and cold in the same breath.' Any other view would be inequitable and unconscionable. Plaintiff or the other devisees cannot take inconsistent positions. 'Upon a principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped, by claiming under it, to attack any of its provisions. . . . So, also, one who accepts the terms of a deed or other contract must accept the same as a whole; one cannot accept part and reject the rest.' Bigelow on Estoppel, 6 ed., p. 744. *Fort v. Allen,* 110 N. C., 191; *Chard v. Warren,* 122 N. C., 86; *Freeman v. Ramsey,* 189 N. C., 790." The judgment is

Affirmed.

STATE v. CHARLES BLACKWELL.

(Filed 9 March, 1927.)

Homicide—Murder—Evidence—Dying Declarations—Defenses.

Dying declarations on a trial for murder made by the deceased with knowledge of approaching death resulting from a pistol shot in the hands of the defendant, which caused the death, are admissible in behalf of the defendant as tending to show that the death resulted from an accident.

APPEAL by defendant from *Cranmer, J.,* at January Term, 1927, of CRAVEN.

The defendant was indicted for murder and convicted of manslaughter. New trial.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. H. Davis and D. H. Willis for defendant.

ADAMS, J. The State did not ask for the defendant's conviction of murder in the first degree, but offered evidence tending to show and requested a verdict for murder in the second degree. The defense was homicide *per infortunium,* or by misadventure. The defendant testified in substance that he had known the deceased for more than a year; that the two were on friendly terms; that the deceased when drinking turned his pistol over to the defendant and requested him to keep it; that the defendant afterwards in the act of returning the pistol took it from under the seat of his car, when it accidentally exploded and wounded the deceased. In support of his defense he offered the following testimony of Dr. Fisher, who attended the deceased:

"Q. Did you see him in his last sickness there? A. Yes, sir.

"Q. How long before he died were you in his presence? About how long, if you know? A. About two hours, I guess.

"Q. Did he make any statement to you the last time that you saw him? A. Not the last time.

"Q. The time before the last? A. Yes, sir, several times.

"Q. Did he make this statement in view of impending death? Did he know he was going to die? A. Yes, sir.

"Q. He knew he was going to die? A. He told me that he did. I don't know that he knew.

"Q. He said he was going to die? A. Yes, he said he was going to die.

"Q. Now, what were those statements?"

The State's objection to the last question was sustained, but the witness would have answered, "That the defendant went to hand him the gun and it fired."

The evidence was excluded probably on the theory that dying declarations are admissible only against the defendant and not in his favor; but the general rule is that they are restricted to the act of killing and the circumstances immediately attending the act and are admissible in behalf of the defense and not confined to their introduction by the prosecution. Wharton says: "The dying declarations of the deceased may be received in favor of the defendant. Upon an indictment for manslaughter a surgeon stated that the deceased seemed perfectly sensible of the dangerous state in which he was, and said he knew he could not get better, and afterwards said, 'I don't think he (defendant) would have struck me if I had not provoked him.' *Coleridge J.,* at first expressed some doubt whether he ought to receive the statement, but afterwards admitted it, observing that it might have an influence on the grade of guilt. But such declarations must be made under a sense of impending dissolution, and they must be relevant to the immediate fact of killing. Hence unless part of the *res gestæ,* they cannot be received to prove the defendant's insanity." 1 Cr. Ev., page 226, sec. 304. And *Underhill:* "The dying declaration may be introduced not only as evidence against the accused, but in his favor as well." Cr. Ev., page 138, sec. 110. In *Mattox v. United States,* 146 U. S., 140, 153, 36 Law Ed., 917, 921, the Court said: "Dying declarations are admissible on a trial for murder as to the fact of the homicide, and the person by whom it was committed in favor of the defendant as well as against him. 1 East,

P. C., 353; *Rex v. Schaife,* 1 Mood. & R., 551; *United States v. Taylor,* 4 Cranch C. C., 338; *Moore v. State,* 12 Ala., 764; *Com. v. Matthews,* 89 Ky., 287." See, also, 30 C. J., 251, sec. 493, with citation of the leading cases which uphold the principle.

In the exclusion of the proposed evidence there was error which entitles the defendant to a new trial. This is admitted in the brief filed on behalf of the State.

New trial.

R. GORDON FINNEY, RECEIVER, v. C. A. CORBETT ET AL.

(Filed 9 March, 1927.)

Actions—Controversies Submitted Without Action—Statutes—Interpretation.

The requirements of our statute, C. S., 626, must be strictly observed to submit a controversy without action to the court for decision, and where it does not sufficiently appear, among other things, that the controversy was real or in good faith, it will be dismissed.

This proceeding was submitted upon what purports to be a controversy without action to *C. C. Lyon, Judge Presiding,* at the November Special Term, 1925, of the Superior Court of JOHNSTON County, and judgment signed on 16 November, 1925.

The plaintiff, Finney, was receiver of the First National Bank of Selma, N. C., and in the purported controversy without action entered into an agreement of compromise with the defendants, who were indebted to the bank at the time of its failure in a large amount.

On 13 November, 1926, certain stockholders and creditors of the bank filed a petition in the cause to set aside said compromise judgment upon the ground that the compromise judgment, while it purported to be a controversy without action, was in fact a compromise between the receiver and the defendants, Worley and Corbett. The motion to set aside said judgment came on for hearing before Cranmer, judge, at the December Term, 1926, who rendered the following judgment:

"This cause coming on to be heard at this term of court upon the motion of certain depositors and stockholders in the First National Bank of Selma, for leave to be made parties to this action, and to set aside the purported judgment herein as signed in November, 1925, the court orders that said parties, to wit, N. B. Snipes, J. T. Wilkins, G. L. Scott, T. R. Fulghum, M. G. Waddell, B. E. Langston, J. Ransom Creech and R. J. Nobles be made parties hereto as of 13 November, 1926, the date of filing their petition and motion; and the court finding that said purported judgment was entered contrary to the course and practice of the court, in that the alleged controversy without action was not a real controversy, but an attempted compromise, and same was injurious to creditors and stockholders of the bank; and, further, that the affidavits supporting said alleged controversy without action do not set out that the same was a real controversy and in good faith, as provided by C. S., 626, the said judgment as signed 16 November, 1925, and filed herein, is hereby adjudged to be void, and is hereby set aside and ordered to be stricken out."

The controversy without action relied upon was not supported by affidavit as required by C. S., 626.

To the foregoing judgment the defendants appealed.

Wellons & Wellons for plaintiffs.
J. W. Bailey and A. M. Noble for interveners.

BROGDEN, J. The interveners contend that the judgment of Lyon, J., rendered in a controversy without action on 16 November, 1925, should be set aside for the reason that the record does not disclose a "controversy without action" as contemplated by law.

What constitutes a controversy without action as contemplated by C. S., 626?

The essentials of such a proceeding are:

1. The existence of a "question in difference."
2. The existence of an adverse claim.
3. The proceeding must be brought in good faith.

These essentials to jurisdiction must appear by affidavit.

The statute, C. S., 626, provides: "But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties." Such an affidavit as the statute requires is a prerequisite to the exercise of jurisdiction. Furthermore, to confer jurisdiction in such cases the requirements of the statute must be strictly observed. *Grant v. Newsom,* 81 N. C., 36; *Jones v. Comrs.,* 88 N. C., 56; *Arnold v. Porter,* 119 N. C., 123; *Grandy v. Gulley,* 120 N. C., 176; *Waters v. Boyd,* 179 N. C., 180; *Burton v. Realty Co.,* 188 N. C., 473.

In *Waters v. Boyd, supra,* the affidavit declared that: "The controversy between them is genuine and is submitted to the court to determine the rights of the parties." The Court held that such an affidavit was not in compliance with the statute and dismissed the action. In *Burton v. Realty Co., supra,* the action was dismissed with the following declaration: "While, upon the facts presented, the title would seem to be valid, we must dismiss the proceeding for want of a real controversy."

In the case now under consideration there is no affidavit at all. Even if the purported controversy without action itself should be treated as an affidavit, there is no allegation that the controversy is real or that the proceeding is brought in good faith. The record shows that the controversy without action submitted to Judge Lyon was verified in the following language: "R. Gordon Finney, Receiver of the First National Bank of Selma, N. C., being duly sworn, deposes and says the foregoing agreed statement of facts and submission of controversy without action is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true."

The proceeding, therefore, did not comply with the statute, and the judgment of Cranmer, J., is

Affirmed.

M. E. HART, EXECUTOR, v. ATLANTIC COAST LINE RAILROAD.

(Filed 9 March, 1927.)

1. **Negligence—Railroads—Evidence—Duty of Deceased to Avoid Injury—Duty of Engineer—Instructions—Appeal and Error.**

   In an action to recover damages of a railroad company for the negligent killing of the deceased and his cow, it is reversible error for the judge to charge the jury upon the evidence that if the deceased was driving his cow in front of the defendant's running train, the defendant's engineer would be justified in assuming that the testate would drive the cow off the track if he was apparently in full charge and possession of his faculties, and he would not be required to stop the train or slacken its speed, as this instruction omits the duty of the engineer to exercise, under the circumstances, ordinary care to have avoided the injury.

2. **Evidence—Negligence—Nonsuit.**

   Under the evidence in this case, viewed in the light most favorable to the plaintiff, defendant's motion as of nonsuit was properly denied.

APPEAL by plaintiff from *Sinclair, J.,* at September Term, 1926, of PITT.

Civil action to recover damages for the death of plaintiff's testate and for the killing of his cow, both alleged to have been caused by one and the same wrongful act, neglect or default of the defendant.

From a judgment of nonsuit on the cause of action for the alleged wrongful death of plaintiff's testate, and an adverse verdict and judgment in favor of defendant on the cause of action for the alleged wrongful killing of plaintiff's testate's cow, the plaintiff appeals, assigning errors.

M. B. Prescott and S. J. Everett for plaintiff.
Skinner, Cooper & Whedbee for defendant.

STACY, C. J. Without stating the facts, some of which are in dispute, we are convinced, from a careful perusal of the record, viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, that both causes of action should have been submitted to the jury. No benefit would be derived from detailing the evidence, as the only question presented, on this phase of the case, is whether it is sufficient to go to the jury, and we think it is.

With respect to the second cause of action, the following excerpt, taken from the charge, forms the basis of one of plaintiff's exceptive assignments of error:

"I charge you that, if you shall find from the evidence and by its greater weight that the engineer on defendant's train saw the cow upon the track coming toward the train, and further saw Mr. Hart driving said cow, and that Mr. Hart was in apparent full possession and control of his faculties, that the engineer of defendant would be justified in assuming that Mr. Hart would drive said cows off the track and there would be no duty upon the part of the defendant to stop its train or slacken its speed, and you should answer the first issue, 'No.'"

This instruction was erroneous, in that it relieved the defendant from the duty of exercising ordinary care to avoid the injury. *Lay v. R. R.*, 106 N. C., 404.

New trial.

FRED WILSON v. SUDIE WILSON BURROUGHS ET AL.

(Filed 9 March, 1927.)

Appeal and Error—Partition—Conflicting Findings—Reversal Without Prejudice.

Where a tenant in common of lands pending proceedings for division has conveyed his interest to a stranger, by deed duly recorded, and the question is whether the purchaser took without actual or constructive notice of an owelty charge against it, and the findings of the trial judge are conflicting as to whether the purchaser took with implied notice in the pending proceedings for partition, the judgment of the court as a matter of law that the purchaser took with notice of the owelty charge will be reversed, without prejudice to the parties, to apply for more definite or specific findings of facts.

APPEAL by Henry C. Smith from *Cranmer, J.*, at January Term, 1927, of PITT. Reversed.

S. J. Everett for the petitioner.
Albion Dunn for appellant.

ADAMS, J. The heirs at law of I. K. Worthington instituted a proceeding for the partition of land before the clerk of the Superior Court of Pitt County. The entries on the record are as follows: "Petition for partition filed 29 November, 1921. Summons issued 29 November, 1921, returnable 12 December, 1921. Summons served 29 November, 1921. Order appointing B. A. Gardner, Sam Johnson and Asa Jones commissioners to divide the land made 13 December, 1921. Order to supply report made 21 October, 1926."

The special proceeding docket does not show that partition has been made or that the report of the commissioners has been confirmed; indeed, so far as the record discloses no order of confirmation has been signed or made. The report purports to charge owelty in the sum of $150 against lot No. 2 in favor of lot No. 4; but no judgment has been indexed as required by C. S., 3232.

On 18 January, 1922, Fred Wilson executed and delivered to H. C. Smith a deed conveying his "interest in the division of the I. K. Worthington lands." The deed was registered the next day, and at this time there was nothing on record to indicate a division of the Worthington property in the special proceeding then pending or the charge of owelty against the land he bought. He paid value for the land and had no notice of the alleged owelty.

The foregoing facts were found by the clerk, and upon appeal the judge affirming and approving the clerk's findings and judgment found as additional facts that the special proceeding was pending when the deed was made and that Fred Wilson "conveyed to Henry C. Smith his share and allotment of land in this special proceeding, and the same being referred to and set forth in the said deed dated 18 January, 1922, as the interest in I. K. Worthington land division, and the said share of land so assigned and allotted Fred Wilson, and lot No. 2 having an owelty lien upon it for $150 in favor of lot No. 4, as set forth on the land division docket assigned and allotted Sophronia Wilson, and the said Henry C. Smith having taken a deed thereto pending the said proceedings, he thereby waived notice of all other proceedings and orders therein, having become the owner of the share of land assigned the said Fred Wilson and being bound by the record and proceedings therein, and the order and findings of the clerk are hereby in all respects confirmed and approved."

If his Honor intended to say that lot No. 2 was specifically described in the deed, the finding is in direct conflict with the clerk's finding which he approved. His further finding that Smith became "the owner of the share of land assigned the said Fred Wilson, being bound by the record and proceedings," for the reason that he took a deed pending the proceedings, conflicts with the further finding that when Smith took his deed there was nothing of record to indicate that the I. K. Worthington lands were being divided in the special proceeding. Whether partition of the land was made before or after Smith received his deed, or whether the report was filed before or after does not appear. If partition was made after his deed was registered why was not he made a party and given an opportunity to be heard? He was never served with summons, and some of the findings show he had neither actual nor constructive notice of the proceeding. As the record now appears we think there was error. The judgment is reversed without prejudice to either party to apply for a more definite and specific finding of the facts.

Reversed.

EASTERN BANK AND TRUST COMPANY ET AL. v. HERBERT BROUGHTON ET AL.

(Filed 9 March, 1927.)

1. **Mortgages—Purchase-Money—Liens—Husband and Wife — Estates—Entireties—Husband's Conveyance—Deeds and Conveyances.**

   Where the husband alone signs a purchase-money note and mortgage, the latter duly registered, on lands conveyed to him and his wife by entireties, it is prior in lien to that of a later registered mortgage on the same lands made by them with another for borrowed money.

2. **Mortgages—Liens—Foreclosure—Sales.**

   The holder of a second mortgage lien on lands is entitled to have the same foreclosed upon or after maturity of the note it secures, subject to the first mortgage.

APPEAL by plaintiff from *Sinclair, J.*, at Fall Term, 1926, of PAMLICO.

Civil action to foreclose a mortgage and to have a prior mortgage declared void and removed as a cloud on title.

From the facts found by the judge—a jury trial being waived by consent of the parties—a foreclosure was ordered as to all the property covered by the mortgage held by plaintiff, except a 30-acre tract of land covered by a prior purchase-money mortgage.

Plaintiff appeals.

Z. V. Rawls for plaintiff.
F. C. Brinson for defendant.

STACY, C. J. Stripped of all redundant matter, the determinative facts, bearing on the question presented, are as follows:

1. On 6 October, 1916, Asa W. Lee and wife, Richilda Lee, conveyed, by proper warranty deed, to Herbert Broughton and wife, Alzetta Broughton, as tenants by the entirety, a 30-acre tract of land, and, to secure the purchase price of said property, Asa W. Lee took from Herbert Broughton his note for $800, secured by mortgage on the premises, which said mortgage was duly executed by Herbert Broughton, but neither the note nor the mortgage was signed by his wife, Alzetta Broughton.

2. On 24 February, 1920, Herbert Broughton and wife, Alzetta Broughton, duly executed a mortgage on this same property, along with other property, to secure their joint obligation to Harry Rawls, who in turn transferred, assigned and conveyed the same to the plaintiff, Eastern Bank and Trust Company.

This suit is to foreclose the mortgage assigned to plaintiff, and it is contended that the purchase-money mortgage given by Herbert Broughton to Asa W. Lee is void and constitutes no prior encumbrance on the 30-acre entirety estate. *Gray v. Bailey,* 117 N. C., 439.

His Honor held that the purchase-money mortgage, though signed by the husband alone, was a valid prior encumbrance to plaintiff's mortgage and ordered a foreclosure of the second mortgage by sale of "the lands described in the pleadings, except the 30-acre tract."

The purchase-money mortgage given by Herbert Broughton to Asa W. Lee is a prior encumbrance to the extent of its worth under authority of the decisions in *Hood v. Mercer,* 150 N. C., 699, *Dorsey v. Kirkland,* 177 N. C., 520, *Greenville v. Gornto,* 161 N. C., 342, and *Bynum v. Wicker,* 141 N. C., 95. See, also, *Johnson v. Leavitt,* 188 N. C., 682, and *Davis v. Bass, ibid.,* 200. In this respect the plaintiff is in no position to complain at the ruling made. But the judgment must be modified so as to permit a sale of the 30-acre tract under the second mortgage, subject only to the rights of the holder of the purchase-money mortgage.

Modified and affirmed.

STATE v. ZACK LEE.

(Filed 9 March, 1927.)

1. **Homicide—Instructions—Evidence—Appeal and Error.**

Where the defendant on trial for a homicide pleads a perfect self-defense upon evidence tending to show that deceased drove into the yard of his home, used abusive language to him and threatened his life, and he fired the deadly shot after the deceased had drawn a pistol on him, a charge of the court based upon the deceased's assaulting the prisoner with his hands, choking him, etc., of which there was no evidence, and upon the theory of a killing without malice, is reversible error to the defendant's prejudice.

2. **Appeal and Error—Instructions—Record—Presumptions.**

Upon appeal from an exception to the instructions of the court, the charge as appears of record will be taken as correct when it is not therein set out in full.

APPEAL by defendant from *Cranmer, J.,* at September Term, 1926, of HARNETT.

Criminal prosecution tried upon an indictment charging the defendant with a capital felony, to wit, murder in the first degree.

From a verdict finding the defendant guilty of murder in the second degree and a sentence at hard labor in the State's prison for a term of six years, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Young & Young and Clifford & Townsend for defendant.

STACY, C. J. The evidence on behalf of the defendant, so far as material to an understanding of the exceptions presented, is to the effect that about the hour of noon, 7 July, 1926, while the defendant was in his house writing a letter, and his sick wife resting on the porch, Paul Griffin came by in a buggy, stopped in defendant's front yard, and began to upbraid Mrs. Lee for having told the defendant of the improper relations existing between the two. Griffin refused to leave, though requested to do so by defendant's wife, and made threats against both the defendant and his wife; whereupon the defendant, who had heard the entire conversation, came out of the house, with a shotgun in his hands, and ordered Griffin away. At this command, Griffin raised up in his buggy, thrust his hand into his hip pocket and said to the defendant, "I done what I wanted to, and G— d— if I don't kill you too." As a consequence, the defendant shot Griffin and killed him.

The evidence on behalf of the State is to the effect that the deceased was shot from ambush while driving along the road in front of the defendant's house.

The following excerpt, taken from the charge, forms the basis of one of defendant's exceptive assignments of error:

"If, however, the deceased assaulted the prisoner, that is, if he laid his hands upon him against his will, and struck him, or choked him, and the prisoner killed the deceased in the heat of passion caused by the assault, and not from deliberation and premeditation, and not from malice, he would not be guilty of more than the crime of manslaughter."

The vice of this instruction lies in the fact that it is not pertinent to the facts of the present case, and is misleading. *S. v. Waldroop, ante,* 12. The assault on the part of the deceased, necessary to reduce the killing to manslaughter, is limited to laying hands upon the prisoner against his will and striking or choking him. None of these things occurred, but, according to the defendant's testimony, he was assaulted by the deceased in such manner as reasonably to put him in fear of losing his life or of suffering great bodily harm at the hands of the deceased. And while the jury did not accept his plea of perfect self-defense, they might have found, had the evidence been submitted to them in a proper light, that, though acting in self-defense, he used excessive force, rendering him guilty of an unlawful homicide or manslaughter. *S. v. Robinson,* 188 N. C., 784; *S. v. Cox,* 153 N. C., 638. The jury evidently did not accept the State's theory of a killing by means of "lying in wait." C. S., 4200.

The whole case seems to have been fought out on the question as to whether the defendant was assaulted by the deceased, or his life or limb endangered, just before the fatal shot. It was error to limit the definition to a battery, such as laying hands upon the defendant, against his will, or striking or choking him.

The entire charge is not in the record, and the case was not settled by the judge, but we must consider it as presented on the appeal.

For the error, as indicated, there must be a new trial, and it is so ordered.

New trial.

JAMES MONTFORD ET AL. v. MOSE SIMMONS ET AL.

(Filed 9 March, 1927.)

Actions—Executors and Administrators—Courts—Jurisdiction—Transfer of Causes—Removal of Causes—Motions.

An action against one who has qualified as administrator of the deceased to recover money collected upon his policy of life insurance, among other things for services rendered the deceased by the plaintiffs during his life time, is an action against the defendant in his capacity of administrator, and not against him personally, and should be removed on proper motion to the court in the county wherein letters testamentary were granted. C. S., 465.

CIVIL ACTION, before *Harris, J.,* at January Term, 1927, of HARNETT.

The plaintiff alleged that in 1900 a negro boy named Sam Humphrey was deserted by his father and driven away from home by his mother, Mag Humphrey; that he went to the home of Handy and Dilcy Montford, who took him into their home and cared for him. The boy thereupon changed his name to William Montford, and was thereafter known as William Montford. The reputed mother of William Montford, to wit, Mag Humphrey, without being divorced, married or went to live with one Mose Simmons as his wife. William Montford enlisted in the army and died or was killed in France, and at the time of his death had a policy of war risk insurance, amounting to $10,000, said policy being payable to Dilcy Montford, his foster mother, as beneficiary. Dilcy Montford, foster mother of said William Montford, died on 19 May, 1924, and her husband, Handy Montford, qualified as her administrator. In a few months Handy Montford also died, leaving the plaintiffs in this action as his and his wife's sole heirs at law and distributees. The defendant, J. W. Burton, duly qualified as administrator of William Montford and as such administrator has collected on said insurance policy, and now has in his hands the sum of $7,839.00.

The said Burton qualified as administrator of William Montford in Onslow County and is a resident of said county. This action was brought in Harnett County. In apt time the defendant, Burton, administrator, filed an affidavit requesting that the suit be removed to Onslow County. The plaintiffs resisted the motion to remove the case to Onslow County on the ground that the administrator was not sued in his official capacity. The motion for removal was heard by the clerk of the Superior Court of Harnett County, who declined to remove the cause, and thereupon the matter was transferred to the judge for determination.

The following judgment was rendered: "This cause coming on to be heard, and having been heard on the motion of the counsel for defendants to have the said cause removed to the Superior Court of Onslow County, for the reason that the said J. W. Burton qualified as administrator in the county of Onslow, and that the said action is against him in his official capacity.

It is ordered that the order of L. M. Chaffin, clerk of the Superior Court of Harnett County, denying said motion be, and the same is hereby affirmed."

From the foregoing judgment the defendant, Burton, appealed.

Young & Young for plaintiffs.
Varser, Lawrence, Proctor & McIntyre for defendants.

BROGDEN, J. Is a suit against an administrator by parties claiming all the funds comprising the estate of an intestate, a suit against the administrator in his "official capacity" within the meaning of C. S., 465?

C. S., 465, provides that "all actions upon official bonds or against executors and administrators in their official capacity must be instituted in the county where the bonds were given," etc.

The defendant, Burton, qualified as administrator in Onslow County and letters of administration were duly issued to him in said county, and this action was instituted in Harnett County. The controversy, therefore, is confined to the question as to whether or not this suit is against the administrator in his official capacity.

When does an action involve official capacity? The essential elements thereof, established by the decisions in this State, are as follows:

1. Where the action undertakes to assert a debt or claim against the estate of the intestate.

2. When the action involves the settlement of the accounts of the administrator.

3. Where the action involves the distribution of the estate to the parties entitled thereto. *Stanley v. Mason,* 69 N. C., 1; *Clark v. Peebles,* 100 N. C., 348; *Roberts v. Connor,* 125 N. C., 45; *Perry v. Perry,* 172 N. C., 62; *Craven v. Munger,* 170 N. C., 424; *Hannon v. Power Co.,* 173 N. C., 520; *Lumber Co. v. Currie,* 180 N. C., 391.

In *Stanley v. Mason, supra,* it is declared that: "The object of the statute was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters, and where they make their returns and settlements, and transact all the business of the estate in their hands." The same principle is recognized and approved in *Lumber Co. v. Currie,* 180 N. C., 391, in this language: "It is well settled in this State that an administrator or executor must be sued in the county in which he took out letters of administration or letters testamentary, provided he, or any of his sureties, lives in that county, whether he is sued on his bond or simply as administrator or executor."

The plaintiffs allege that they are the next of kin of Dilcy Montford, "and by reason of same, are the owners of and entitled to possession of the insurance money in the hands of J. W. Burton, administrator." The plaintiffs further allege that the deceased, William Montford, promised and agreed to pay his foster parents, Handy and Dilcy Montford, "for keeping him during his infancy and for raising him to manhood." The record further discloses that the plaintiffs "pray judgment that they recover of the defendants and each of them the sum of $7,839 with interest." Therefore, it appears that the plaintiffs seek to obtain a judgment against the administrator for the entire funds in his hands, and, further, that the plaintiffs are seeking to enforce a promise made by the intestate to pay Handy and Dilcy Montford for his maintenance during his minority, and also to assert a claim against the administrator for the distribution of the entire fund in his hands. The assertion of these claims necessarily involves the discharge of official duties by the administrator, and, therefore, under the statute and under the decisions of this Court, the suit should have been removed to Onslow County.

Plaintiffs rely upon the cases of *Roberts v. Connor,* 125 N. C., 46, and *Craven v. Munger,* 170 N. C., 425. In the *Craven case* the suit was not brought against Mrs. Munger as executrix at all, but was brought against her personally for personal services rendered her in the discharge of her duties as executrix of her husband. In the opinion of the Court it is specifically pointed out that the suit was not brought for a settlement of her accounts as administratrix or executrix or even for a debt of her intestate. So that the *Craven case,* in its final analysis, supports the contention of defendant. In the *Roberts v. Connor case* it was held that: "There are no allegations in the complaint charging or suggesting that the action is founded on a debt or a liability of 'A. Branch,' nor is it suggested that the defendant has violated any of the trusts imposed on him by the terms of the will of 'A. Branch.' If these things had been alleged in the complaint, it would have been a proper case for removal."

The present action is based upon a claim against the estate of the intestate and involves a settlement of the accounts of the administrator and the distribution of funds in his hands. This suit, therefore, is a suit against the defendant in his official capacity.

Reversed.

PASQUOTANK DRAINAGE DISTRICT, No. 1, v. W. L. CAHOON, A. F. STAFFORD, E. C. BRITE, CADER RIGGS AND WILLIAM GRIFFIN.

(Filed 9 March, 1927.)

1. **Drainage Districts — Assessments — Benefits — Enlarging Districts—Judgments—Res Judicata.**

   When under the provisions of C. S., 5320 a drainage district has been formed within certain boundaries with the assessments of the lands of the owners therein regularly made in accordance with the benefits to be acquired, and the matter proceeds to final judgment as the statute prescribes, excluding the *locus in quo* from the assessment rolls, the question of benefits is *res judicata,* and a supplementary petition to enlarge the boundaries of the established district so as to include contiguous lands and to subject them to assessment for benefits received may not be entertained, and a demurrer *ore tenus* and a motion to dismiss the petition for want of authority will be sustained. 3 C. S., 5373(a).

2. **Same—Interpretation of Statutes.**

   While statutes establishing drainage districts are to be liberally construed (C. S., 5379) and many corrections necessarily made as the work progresses, and the proceedings subject to the filing of supplementary petitions, bringing the proceedings forward by interlocutory orders upon notice, etc., this does not extend to the final judgment determining the question of assessments of owners of land as to benefits received, or to permit the enlargement of the district to take in the owners of adjoining lands.

APPEAL by petitioner, or plaintiff, from *Daniels, J.*, at January Term, 1927, of PASQUOTANK. Affirmed.

Aydlett & Simpson for plaintiff, petitioner.
Ehringhaus & Hall for defendants, respondents.

CLARKSON, J. A petition was duly filed under chapter 442, Public Laws 1909, and amendments thereto, Public Laws 1911, ch. 67, etc., and especially by virtue of that certain amendment, chapter 76, Public Laws 1921, to establish a drainage district in Pasquotank County, N. C., 2 and 3 C. S., ch. 94. The petition described the boundaries of the land, excluding the land now in controversy. The petitioner alleged that the drainage district would afford a much needed and adequate public highway; that the lands within the district will be greatly improved and the public health greatly conserved. The canal to be approximately seven miles in length from the eastern edge of the Dismal Swamp to its mouth in Pasquotank River.

The proceedings seem to be carefully prepared and in accordance with the statute: (1) Bond for cost given; (2) Summons; the respondents in this summons numbering more than 100, include the petitioner and respondents in the present proceedings; (3) Order appointing viewers; (4) Preliminary report of the board of viewers; (5) Order fixing date of hearing upon preliminary report of viewers; (6) Affidavits of posting and printing notices of hearing of preliminary report; (7) Order of clerk on hearing of preliminary report establishing drainage district; (8) Final report of engineer and viewers. This detail report, complete in every respect, giving location of district, area of district 7,146.4 acres, classification of lands, estimated cost of land per acre in each class; (9) Affidavits of posting and printing notices of hearing of final report; (10) adjudication of the final report. "The Court finds that the benefits which will accrue to the lands to be affected by the proposed drainage will far exceed the cost of construction of the proposed canal, and the Court hereby and in all respects confirms the report of the board of viewers," etc.

The classification of the land in the drainage district includes certain lands belonging to the respondents, or defendants, in the present cause, *but excludes the land which is now sought to be included in and made a* *part of the drainage district,* and which land lies "immediately contiguous to the lands included in said drainage district, and division line running through respondent's tracts."

In the original cause, the elections for drainage commissioners were regularly and properly held and commissioners elected, duly qualified as provided by law. The assessment roll for drainage assessments were regularly and properly prepared and certain lands belonging to the respondents in the present cause were included in said assessment roll, *but the lands of respondents now sought to be included in said drainage district were excluded from said assessment roll.*

The adjudication of the final report was dated 22 November, 1921. An order was made 5 September, 1925, all parties being represented before the court, that the board of commissioners of the said drainage district be allowed to amend their assessment roll to meet certain indebtedness, there being a deficit. The additional assessment roll was duly allowed, including certain of the lands belonging to the respondents, or defendants, in this cause, *but excluded the lands of respondents now sought to be included in said drainage district.*

The plaintiff, or petitioner, filed a petition in the Pasquotank Drainage District No. 1, the original cause, and alleged that respondents', or defendants' lands, about 400 acres, are greatly benefited by reason of the drainage and that said lands (describing same) be taken in the district. "That the boundaries of said drainage district be enlarged so as to include the lands set out above, and that the viewers may be sent upon said lands to classify the same, and to assess the same for the prorata part of the expense and for such other and further relief as may seem just and proper to the court."

Defendants, respondents, moved "to dismiss the said petition and demurred *ore tenus* to the same, for that this court is without jurisdiction to hear the same, and for that there is no authority in the statutes of North Carolina for such proceeding, and for that the parties to this petition and respondents and said drainage district itself are concluded by the judgment heretofore rendered in this proceeding, and to which reference is made in said petition, and for that on its face this petition seeks to reopen the amount of assessment against said respondents and also the question of what lands are benefited by the drainage therein contemplated and provided for, both of which matters are concluded by the previous judgments and orders in said cause, and that said questions cannot be here and now further inquired into, and for that this court is without jurisdiction to hear any of the matters averred in said petition."

The court below sustained the demurrer from which plaintiff appealed. We think the court below correct in its decision.

Plaintiff, the petitioner, contends that the sole question: Under the drainage law after a drainage district has been established, commissioners appointed and the ditches dug, can the commissioners in the proceeding *file a supplemental petition* and maintain the same to extend the boundaries of the district so as to include about four hundred acres more land which are benefited by the drainage district, and which now drain into the canals cut by the district, or is the final judgment establishing the district *res judicata* and conclusive of the rights of the parties for all time?

C. S., 5320, is as follows: "The board of viewers shall proceed to examine the land described in the petition, and other land if necessary to locate properly such improvement or improvements as are petitioned for, along the route described in the petition, or any other route answering the same purpose if found more practicable or feasible, and may make surveys as may be necessary to determine the boundaries and elevation of the several parts of the district, and shall make and return to the clerk of the Superior Court within thirty days, unless the time shall be extended by the court, a written report, which shall set forth: 1. Whether the proposed drainage is practicable or not. 2. Whether it will benefit the public health or any public highway or be conducive to the general welfare of the community. 3. Whether the improvement proposed will benefit the lands sought to be benefited. 4. Whether or not all the lands that are benefited are included in the proposed drainage district. They shall also file with this report a map of the proposed drainage district, showing the location of the ditch or ditches or other improvement to be constructed and the lands that will be affected thereby, and such other information as they may have collected that will tend to show the correctness of their findings."

The viewers, under section 4, *supra,* must see to it that "all the lands that are benefited are included in the proposed drainage district." In the present case the land sought to be brought in the drainage district, the question of benefits was adjudicated in the original cause and the land excluded.

The Drainage Act has been materially amended to make a more perfect law to meet different situations since chapter 442, Public Laws 1909, when the first comprehensive system was invoked for the State. See Public Laws 1923, ch. 217 and 231. The latter chapter makes certain provision for *maintenance and improvement,* and provides that the board of drainage commissioners file petition, etc. 3 C. S., part sec. 5373(a): "Setting forth the facts that the canals in their districts are not sufficient to afford proper drainage, and that, in the opinion of the board, the said canals need to be recleaned, widened, deepened, or lengthened, or that additional canals should be cut in certain places," etc.

In *Staton v. Staton,* 148 N. C., at p. 491, the following is held: "This is in effect a motion in the cause. From the nature of the proceeding, the judgment in 1886 is not a final judgment, conclusive of the rights of the parties for all time, as in a litigated matter. But it is a proceeding *in rem,* which can be brought forward from time to time, upon notice to all the parties to be affected, for orders in the cause, dividing (as here sought) the amount to be paid by each of the new tracts into which a former tract has been divided by partition or by sale; to amend the assessments, when for any cause the amount previously assessed should be increased or diminished, for repairs; for enlarging and deepening the canal or for other purposes, or to extend the canal and bring in other parties. It is a flexible proceeding, and to be modified and moulded by decrees from time to time to promote the objects of the proceeding. The whole matter remains in the control of the court. It is not necessary, however, to keep such cases on the docket, but they can be brought forward from time to time, upon notice to the parties, upon supplementary petition filed therein, and further decrees made to conform to the exigencies and changes which may arise." *Forehand v. Taylor,* 155 N. C., 355; *Newby v. Drainage District,* 163 N. C., 24; *Shelton v. White,* 163 N. C., 90; *In re Lyon Swamp,* 175 N. C., 270; see *Banks v. Lane,* 170 N. C., p. 14.

In re Lyon Swamp Drainage District, supra, it is said, at p. 272: "Subsequent events, such as the silting up of a canal, or washouts by reason of torrential rains, or other causes, may cause a necessity for some changes in the plans originally adopted, or experience may point out unforeseen defects, and for this and other causes the corporate body itself can make proper changes in its plans, or they can be ordered upon supplementary petition before the clerk, subject, however, *in both cases to the rule that there can be no radical change made in the plan marked out in the original proceedings, or any that will be a detriment to the rights of the bondholders or to the other proprietors within said district."* (Italics ours.)

In examining the authorities elsewhere, we find *Squaw Creek Drainage District v. Turney,* 235 Missouri, p. 80, it is there held that under the Act of 1905, providing that any drainage district organized under article 3 of the drainage law *"may be enlarged and the boundaries extended so as to include other lands contiguous thereto,"* a drainage district may be enlarged to include lands not heretofore embraced within its boundaries. Machinery is provided for notice, consideration of benefits, etc. The Court said, at p. 86: "Up to the time of the passage of the act approved 8 April, 1905, amending the provisions of article III, ch. 122, of the Revised Statutes then in force relating to swamp and overflowed lands, there seems to have been no way by which they could enlarge the territorial scope of their undertaking."

This case was cited and approved in *Cole et al. v. Norborne, Land Drainage District,* 270 U. S., p. 45 (46 Supreme Court Reporter, p. 196), a case likewise from Missouri: "The grounds on which relief is sought are that section 40 of the drainage laws of 1913 (Laws 1913, p. 254), under which the plaintiff's lands were brought into the drainage district, is contrary to the Fourteenth Amendment, and that the inclusion of their lands was an arbitrary exercise of power for the purpose of making the plaintiffs pay for benefits they did not share." The U. S. Court held: "Under the laws of the State a drainage district was incorporated which originally contained, it is said, 14,400 acres. In a later year, upon petition of the supervisors of the district, the boundaries were enlarged in due statutory form so as to take in nearly 24,000 acres more of adjoining land, including that now concerned. It is not disputed that the original district was lawful in all respects. In general there can be no doubt that a State has power to add more land that shares the benefit of a scheme, to the lawfully constituted district that has to pay for it, and to do so against the will of the owners. *Houch v. Little River Drainage District,* 239 U. S., 254; 262, 36 S. Ct., 58, 60 L. Ed., 266; *Squaw Creek Drainage District v. Turney,* 235 Mo., 80, 138 S. W., 12; *Mudd v. St. Francis Drainage District,* 117 Ark., 30, 173 S. W., 825; *Faithorn v. Thompson,* 242 Ill., 508, 90 N. E., 303."

Under the facts and circumstances of this case we can find no authority under the decisions of this State construing the Drainage Statutes giving any right to plaintiff to sustain this action. In the *Squaw Creek Drainage District case, supra,* the act was passed to meet certain conditions relative to contiguous lands. In that case it was contended that "The decree of the court excluding defendant's said land from the original proceedings for the incorporation of said drainage district was not *res adjudicata,* and was and is no bar to this proceeding. No topographical survey had at that time been made. No scheme or plan of drainage had been formulated or adopted and no work or improvement had been commenced or completed and no lands had been benefited or improved." In the present case the questions of benefits were adjudicated and the statute so required. Whether, under our Constitution and the principle of vested rights, a retroactive act could be passed, is not before us.

In *O'Neal v. Mann, ante,* 153, controversy involving the validity of chapter 611, Public Laws 1925, entitled "An act excluding certain lands from Mattamuskeet Drainage District," this Court, *Justice Connor,* writing an able opinion founded on fundamental principles, held the act invalid. As bearing on the present controversy, the opinion says: "Lands embraced in the boundaries of a proposed district, whose owners are unwilling to join in the petition, or who oppose the establishment of the district, may be included therein only upon a finding by the court that such lands will be benefited by the drainage resulting from the establishment and organization of the district; the court has the power to include such lands in the district, and to assess them for their porportionate share of the expense, only because of the benefits which they will receive."

In the original cause this very question was decided that the land sought here to be taken in was not benefited. It is provided, C. S., 5379, that the Drainage Act "shall be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands." . . . The remedies provided for in the act "shall exclude all other remedies."

The drainage acts of the State have been of great service in the creation of wealth and the promotion of health. Perhaps no legislation has been of more value in certain sections of the State to increase the productiveness of lands, and thus crop values, and the health of the citizens, than these drainage acts. The acts are well within the police power of the State. The drainage of wet lands not only promote public health, welfare and render the land fit for habitation and use, but the lands are made more productive and the crop values materially increased.

So, important acts for the benefit of health and the production of wealth should be liberally construed, but in so doing, we should not forget certain well-founded governmental principles that no land can be taken without being benefited. In the original controversy it was found as a fact that the land was not benefited, and therefore excluded. There is no legislative enactment allowing a proceeding of this kind to be reopened to determine the question.

From a careful consideration, the judgment below is

Affirmed.

J. T. JEFFREYS v. B. A. HOCUTT AND LUCILE HOCUTT, HIS WIFE, AND J. D. JEFFREYS AND NANCY JEFFREYS, HIS WIFE.

(Filed 9 March, 1927.)

Execution—Judgments—Liens—Levy—Sheriffs—Deeds and Conveyances —Return Day—Void Deeds.

A judgment is a lien upon lands of the defendant, and upon issuance of an execution the sheriff has such an interest as clothes him with the power to sell only until the date of its return to the court; and a sale made thereafter is void, and the sheriff's deed conveys no title to this grantee. C. S., 614, 672. The distinction pointed out as to execution sales of personal property where the sheriff takes and delivers possession under *fieri facias* and *venditioni exponas.*

APPEAL by defendants from *Sinclair, J.,* at April Term, 1926, of JOHNSTON. Affirmed.

Civil action to recover the possession of land, etc. At the September Term, 1921, of the Superior Court of Johnston County, Bryant Rayborn recovered a judgment against the plaintiff, who at that time owned a life estate in the land in controversy. The judgment was duly docketed, and execution was issued on 14 December, 1921, returnable to the February Term, 1922, of the Superior Court of Johnston. After due advertisement the land was sold under this execution by the sheriff on Monday, 13 March, 1922, which was the first day of the regular March term. By virtue of this sale the sheriff executed and delivered to the defendant, J. D. Jeffreys, as purchaser, a deed purporting to convey title to the land, and the defendant Hocutt in good faith purchased from Jeffreys.

The February Term, 1922, scheduled for two weeks, began on 20 February and extended through Saturday, 4 March. The regular March Term began on 13 March. The sheriff's deed is dated 25 March, 1922.

The case was heard upon an agreed statement of facts, and it was adjudged that the plaintiff is the owner and entitled to the possession of the land, that the sheriff's deed be canceled, and that the cause be retained for the purpose of determining the value of the rents and profits. The defendants excepted and appealed.

Parker & Martin for plaintiff.
Leon G. Stevens and Winfield H. Lyon for defendants.

ADAMS, J. The execution issued on 14 December, 1921, was returnable to the February Term, 1922. This term began on Monday, 20 February, and ended on Saturday, 4 March. The sale was made on the first day of the next term, which was 13 March, the plaintiff laying no claim to a homestead exemption. Whether the sale was valid is the sole question for decision.

At common law the king had a right of execution against lands as well as goods, because the debtor held mediately or immediately from the king and was regarded as bound, not only in person, but as the tenant of a feud; but lands were not subject to execution for the debt of any private citizen. As the writ of *fieri facias* extended only to the goods and chattels of the judgment debtor and the growing profits of his land, and did not run against the land itself, relief was sought in the writ of Elegit (Westm. 2, 13 ed., 1), by which, if the debtor's goods and chattels were not sufficient, one-half of his freehold lands were delivered to the creditor. 2 Freeman on Executions, sec. 172; *Coombs v. Jordan,* 22 A.D. (Md.), 236, 256; 3 Bl., 418; *Smith v. Spencer,* 25 N. C., 256. When some of our earlier decisions were rendered a similar statute was in force in this State. It was provided that lands should be chargeable with debts and should be subject to the same process and remedies that personal estate was subject to; also that it should be in the election of the judgment creditor to have a writ of *fi. fa.* directing the sheriff to levy on the debtor's lands and goods, or to deliver to the creditor the chattels of the debtor, except such as were exempt from execution, and one-half his land, "until the debt or damage be levied, upon a reasonable extent or price." Revised Statutes, ch. 45, sec. 3. If the creditor elected to issue the writ of *fi. fa.* the officer, contrary to the rule at common law, could levy upon real as well as personal property. *Barden v. McKinne,* 11 N. C., 279; *Tarkinton v. Alexander,* 19 N. C., 87. Personal property, if seized, could be sold after the return of the writ and at any distance of time; that is, if a levy of goods was made in due time the sheriff could complete the levy by selling them after the return day; but after the return day he could not make the levy. *Lanier v. Stone,* 8 N. C., 329; *Barden v. McKinne, supra; Smith v. Spencer, supra.* The reason given by the Court was this: By the seizure of goods and chattels the sheriff acquired a qualified property in them and could maintain an action founded on this right. He could sell by virtue of this property though his writ had been returned; he did not need a subsequent order of sale, for the goods were *in custodia legis. Barden v. McKinne, supra; Seawell v. Bank,* 14 N. C., 279; *Tarkinton v. Alexander, supra; Samuel v. Zachery,* 26 N. C., 377.

It was not so, however, as to land, concerning the sale of which the Court said: "The sheriff makes no seizure; is not liable for the value; the debtor is not discharged to that or any amount; the sheriff acquires no possession. He only sells the defendant's estate in the lands. He does not deliver possession to the purchaser as he does in the sale of goods, but only clothes him with the defendant's estate, and leaves him to acquire possession as he can. This shows very clearly that the sheriff sells (land) by virtue of a power, and not by virtue of a special property of any kind." *Seawell v. Bank, supra.* Accordingly, it was held that if the sheriff levied upon land under a *fi. fa.* and returned his writ he could not thereafter sell the land without a *venditioni exponas,* which continued the lien and the authority to sell. *Smith v. Spencer, supra; Walton v. Jordan,* 65 N. C., 170; *Baldwin v. York,* 71 N. C., 463. As he was authorized to sell only by virtue of a power, when his power ceased his right to sell also ceased; and it was decided that the day on which the execution was returnable was "the utmost time allowed by the law to execute it" *(Lanier v. Stone, supra)*, although a sale of land could be made on the return day. *Tayloe v. Gaskins*, 12 N. C., 295. Upon this principle the Court adjudged that a sale of land made after the writ had expired was void. *Love v. Gates*, 24 N. C., 15. These decisions are to the effect that when the mandate expires by limitation the officer's authority to sell real property comes to an end.

In this respect the law now in force is no less stringent than the statutes which controlled the former practice. A judgment recovered in the Superior Court for the payment of money is a lien on land from the moment it is docketed, and executions issued to enforce collection are returnable to the next term of the court beginning not less than forty days after they are issued. With the return day the mandate expires and the power to sell land under the particular writ is thereafter withheld. C. S., 614, 672. The principle is expressed in *Rogers v. Cawood*, 55 A.D. 729, 732: "He (the sheriff) acts, in the levy and sale of land, under a mere naked power conferred by the execution, and to be exercised in conformity to its directions. The power ceases at the return of the writ, and until it shall be renewed no valid sale can be made. *Overton v. Perkins*, 10 Yerg., 329, is in point to this conclusion. There is no difference in this respect between the *fieri facias* and *venditioni exponas*. The same reason and principle should apply to both."

In the present case at the end of the February Term the execution, as said by *Chief Justice Taylor*, was dead in law; and as no alias was issued the sheriff had no authority to sell the plaintiff's land. His deed conveyed no title; J. D. Jeffreys was not a purchaser under an irregular execution, but a purchaser at a sale which was made without an execution. *Barden v. McKinne, supra*. The cases on which the appellants rely are applicable to executions or sales which are merely irregular, not to those which are void. In *Mordecai v. Speight*, 14 N. C., 428, the sheriff did not sell on the return day, but on the day following, and during the term to which the writ was returnable. The sale was sustained under *Lanier v. Stone, supra*, because the statute in respect to the postponement was directory and the delay did not invalidate the sale. *Brooks v. Ratcliff*, 33 N. C., 321. The other cases are distinguishable and require no discussion. The judgment is

Affirmed.

STATE v. GEORGE FRANK BAZEMORE.

(Filed 16 March, 1927.)

1. **Homicide—Evidence—Identification.**

   Upon the question of the identity of the defendant on trial for a homicide as the one who had committed the crime, the hesitancy of the witness to identify him, followed by his positive and unequivocal testimony that the prisoner was the one, is properly admitted over the defendant's exception.

2. **Homicide—Circumstantial Evidence—Nonsuit.**

   A conviction of murder in the first degree may be had upon sufficient circumstantial evidence.

3. **Homicide—Murder in the First Degree—Presence of Judge—Constitutional Law.**

   For a conviction of murder in the first degree under our statutes, C. S., 4200, 4642, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under Constitutional Mandate, Const., Art. I, secs. 13, 17, which right may not be waived.

APPEAL by defendant from *Stack, J.,* at December Term, 1926, of GREENE.

Criminal prosecution tried upon an indictment charging the defendant with a capital felony, to wit, murder in the first degree.

From an adverse verdict and sentence of death entered thereon, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. Paul Frizzelle for defendant.

STACY, C. J. It appears from the State's evidence that on 5 November, 1926, Gordon Yelverton, a young white man, started from his home in Martin County with a truck-load of tobacco to be sold on the Wilson market. The prisoner, a colored man, was with him on the truck. Yelverton was shot in the back of the head and killed just inside the Greene County line on the Greenville-Wilson highway. His body was found in a clump of woods a short distance from the road. The prisoner proceeded with the truck of tobacco and sold the same as his own on the Farmville market. He was arrested three days later and placed in the Wilson County jail for safe-keeping. While there, a number of witnesses went to the jail to identify the prisoner. W. P. Daniels, over objection of the prisoner, testified as follows:

"I am chief of police in Williamston. I was called on to go to Wilson to identify George Frank Bazemore. I was accompanied by Sheriff Roberson and Mr. J. W. Hardy. I saw the defendant there. He was among others, I suppose twelve or fifteen, whose ages ranged from eighteen to thirty-five years. The sheriff called them out. Mr. Hardy said that when he was coming over to Wilson he didn't know whether he could identify the negro who had come into his store on the morning of 5 November with the white boy who was driving the truck or not, except that he had on a light hat. Speaking to the defendant, I said, 'George, go get your hat,' and he went and brought his hat. Mr. Hardy then said, 'that looks like the negro, but he hasn't got the hat fixed the same way.' He was in the habit of wearing it pushed in all 'round, and I said, 'George, fix your hat like you usually wear it,' and he did it. Then Mr. Hardy said, 'that's him; I would swear to him anywhere in the world.'"

This evidence was competent. *S. v. Godette,* 188 N. C., p. 503; *S. v. Graham,* 74 N. C., 646. J. W. Hardy had previously testified to the same state of facts.

The prisoner also insists upon his exception directed to the refusal of the court to grant his motion, duly made under C. S., 4643, for judgment as of nonsuit. The evidence, while largely circumstantial, was sufficient to carry the case to the jury and to warrant a conviction of murder in the first degree. *S. v. Melton,* 187 N. C., 481; *S. v. Matthews,* 66 N. C., 106.

We regret that this opinion cannot be closed here, for no error seems to have been committed on the trial of the cause prior to the rendition of the verdict. An irregularity, however, appears on the face of the record which makes it necessary to remand the case for a new trial. In the record as first certified to this Court, it is stated that the jury "for their verdict return into open court and say, and each for himself saith, that the defendant, George Frank Bazemore, is guilty of the felony and murder whereof he stands charged." Upon the verdict a sentence of death was entered. It was said in *S. v. Truesdale,* 125 N. C., 696, that since the Act of 1893, now C. S., 4200 and 4642, dividing murder into two degrees, first and second, a verdict which fails specifically to find the prisoner guilty of murder in the first degree will not support a death sentence. And to like effect is the decision in *S. v. Jefferson,* 125 N. C., 712. See, also, *S. v. Murphy,* 157 N. C., 614, and *S. v. Ross, ante,* 25. It was specified in the Act of 1893 that no alteration or modification of the then existing form of indictment for murder should be required, but that "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree."

Thinking that an error had probably crept into the record in making up the transcript on appeal, we directed a *certiorari* to the clerk, requiring another certificate of the verdict as taken and recorded in the Superior Court of Greene County. In response, the clerk certifies that the following appears upon the minutes of the court:

"After hearing the evidence, both for the State and the defendant, the argument of the solicitor and counsel for the defendant, and his Honor's charge, the jury repaired to their room for deliberation, and the court takes a recess until 9:30 o'clock Thursday morning. The court leaves instruction that, if the jury agree, the clerk of the court shall take the verdict, conditioned on the solicitor and the defendant and his counsel being present in court at the time. At 8:10 o'clock the jury return into court, each juror answers to his name when called by the clerk, and when asked by the clerk, 'Have you all agreed upon your verdict?' the jury respond, 'We have.' The clerk asks, 'Who shall speak for you?' The jury answer, 'J. M. Albritton.' Then the clerk addressed the prisoner, George Frank Bazemore, 'Hold up your right hand.' The clerk said to the jury, 'Gentlemen of the jury, look upon the prisoner. What say you? Is he guilty of the felony and murder whereof he stands indicted or not guilty?' They say, 'Guilty of murder in the first degree.' The clerk then said to the jury, 'Hearken to your verdict as the court recordeth. You say that George Frank Bazemore is guilty of the felony and murder whereof he stands charged. So say you all?' The defendant and the defendant's counsel were present in court."

It is observed, in passing, but no point is made of the discrepancy, that when the jury were commanded to hearken to their verdict as the court recordeth, the expression "guilty of the felony and murder whereof he stands charged" was substituted for "guilty of murder in the first degree," as used by the foreman. Speaking to the manner of receiving verdicts in capital cases, *Faircloth, J.,* delivering the opinion of the Court in *S. v. Young,* 77 N. C., 498, said: "When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say, 'So say you all?' At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise is only a mode, more satisfactory to the prisoner, of ascertaining the *fact* that it is the verdict of the whole jury." In *S. v. Bagley,* 158 N. C., p. 610, it was held to be the duty of the presiding judge to look after the form and substance of a verdict so as to prevent a doubtful or insufficient finding from passing into the records of the court. See, also, *S. v. McKay,* 150 N. C., 813, and *S. v. Godwin,* 138 N. C., 583.

But the overshadowing objection to the verdict is that it was not taken in the presence of the presiding judge at all. It was received by the clerk in his absence, presumably with the consent of the prisoner and his counsel, as no exception was taken at the time, though this does not definitely appear. However, without regard to this circumstance, it is the universal holding that, in capital cases, the verdict must be taken in the presence of the presiding judge and in open court. "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." Const., Art. I, sec. 13. His Honor, therefore, was without authority, in the instant case, to delegate to the clerk the power to accept the verdict of the jury in his absence. *S. v. Jackson,* 21 S. D., 494, 16 Ann. Cas., 87, and note; *Allen v. State,* 13 Okla. Crim., 533; L. R. A., 1917 E, 1085, and note; *Waller v. State,* 40 Ala., 332; *Nomaque v. People,* 1 Ill., 145, 12 Am. Dec., 157; *McClure v. State,* 77 Ind., 287; *S. v. Jefferson,* 66 N. C., 309; 27 R. C. L., 841.

Animadverting on the subject in *S. v. Austin,* 108 N. C., 780, *Clark, J.,* said: "The defendants had the right to have the verdict rendered in the presence of the judge, and it is best that it should always be done. But it is certainly competent, except in capital cases, for it to be received by the clerk if no exception is made, and the opportunity is given the defendant to object, 'and such practice is very common.' *Pearson, C. J.,* in *Houston v. Potts,* 65 N. C., 41. Indeed, in all cases not capital the defendant may even waive his own right to be present, either expressly *(S. v. Epps,* 76 N. C., 55) or by voluntarily withdrawing himself from the jurisdiction of the court *(S. v. Kelly,* 97 N. C., 404; *S. v. Jacobs,* 107 N. C., 772), though his counsel cannot waive it for him. *S. v. Jenkins,* 84 N. C., 812."

The prisoner's motion for a new trial should have been allowed because of the irregularity in receiving the verdict in the absence of the judge. This was an inadvertence on the part of the learned judge who presided at the trial, but the right is one to which the prisoner is entitled under the law. His motion not having been allowed in the court below, it will be granted here.

But it may be said that no possible harm has come to the prisoner, and hence the verdict ought to be allowed to stand. The answer to this is, the Constitution provides that no person shall be "deprived of his life, liberty or property, but by the law of the land" (Const., Art. I, sec. 17), and the verdict, as here rendered, is not sanctioned by the law as administered in our courts. *S. v. Jackson, supra.*

New trial.

ATLANTIC COAST LINE RAILROAD COMPANY v. TOWN OF SANFORD, NORTH CAROLINA, W. H. FITTS, MAYOR, J. R. RIVES, K. L. BALDWIN, L. M. SPIVEY AND E. P. WICKER, ALDERMEN OF TOWN OF SANFORD.

(Filed 16 March, 1927.)

Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Interest—Injunction—Damages—Statutes.

Where the statute provides that interest on the amount of assessments made by the municipality against lands of owners abutting a street improved shall bear interest at a specified rate from the date of final findings by the board of aldermen, and the pending proceedings have been stopped by injunction of one of such land owners, the interest will begin to run from the date of the final findings of the board, when sustained by the court, the damages caused by the injunctive delay being otherwise provided for by C. S., 854.

APPEAL from *Sinclair, J.,* at September Term, 1926, of LEE. No error.

The judgment in the court below was as follows:

"This cause coming on to be heard, and being heard before the undersigned judge presiding, at the September Term, 1926, of the Superior Court of Lee County, and a jury duly empaneled upon exceptions filed to the assessment for street improvement costs levied by the town of Sanford against the Atlantic Coast Line Railroad Company, in Paving District No. 1, Division A and B, as laid out and created by ordinances of said town, and the court having submitted to the jury the following issues:

'1. Does the Atlantic Coast Line Railroad Company's property abut upon the western side of Chatham Street, between the south line of Harrington Street and Hickory Avenue, and, if so, for what distance? Answer: Yes, 285 feet.

'2. Does the Atlantic Coast Line Railroad Company's property abut upon the western side of Chatham Street, between the north line of Hickory Avenue and the corporate limits of the town of Sanford, and, if so, for what distance? Answer: Yes, 2,483.5 feet.

'3. Does the Atlantic Coast Line Railroad Company's property abut upon the western side of Chatham Street and north of the south line of Harrington Street, and, if so, for what distance? Answer: Yes, 96 feet.'

And the jury for its verdict say, in answer to the first issue, 'Yes, 285 feet'; and in answer to the second issue, 'Yes, 2,483.5 feet,' and in answer to the third issue, 'Yes, 96 feet.'

And it appearing to the court that the board of aldermen of said town of Sanford had heretofore ascertained, determined and declared the total cost of street improvement work in said Paving District No. 1, Division A and B, to be $42,281.37; that the assessments upon property abutting along and upon the eastern side of Chatham Street in Division B, lying north of the south line of Harrington Street and opposite the property of the Atlantic Coast Line Railroad Company, representing one-third of the actual cost of such street improvement is $4.859753 for each foot of property abutting thereon; and that the assessment abutting against property abutting along and upon the eastern side of Chatham Street, and opposite the side upon which the property of Atlantic Coast Line Railroad Company abuts, in that portion of Division A, lying between the south line of Harrington Street and Hickory Avenue, representing one-third of the actual cost of such street improvement is $4.339492 for each foot to property abutting thereon.

And it further appearing to the court that, after notice to Atlantic Coast Line Railroad Company, as required by law, the board of aldermen of the town of Sanford did, on 22 August, 1925, make final assessment against the property of the Atlantic Coast Line Railroad Company abutting Chatham Street, lying in Paving District No. 1, Division A and B, and from such assessment an appeal was taken to the Superior Court of Lee County by said Atlantic Coast Line Railroad Company.

And it further appearing to the court that all proceedings, ordinances and resolutions had by the board of aldermen of said town were had and perfected in the manner and in all respects as required by law, it is

Considered, ordered and adjudged, that the assessment of costs heretofore made and levied against the Atlantic Coast Line Railroad Company and its property abutting on the west side of Chatham Street, for street improvement work done in Paving District No. 1, extending along Chatham street in the town of Sanford, Division A and B, of such district, be and the same are hereby in all respects ratified and confirmed, and that the said town of Sanford do have and recover of the Atlantic Coast Line Railroad Company the sum of $10,795.07, together with interest thereon from and after 22 August, 1925, at the rate of five and three-quarters of one per cent per annum, until paid, of which amount the sum of four hundred, sixty-six and 54/100 dollars represents assessment of cost of improvement against property of Atlantic Coast Line Railroad Company abutting 96 feet on Chatham Street, north of the south line of Harrington Street, the sum of one thousand, two hundred, thirty-six and 75/100 dollars represents assessments of costs of improvement against property of the said Atlantic Coast Line Railroad Company abutting 285 feet on Chatham Street between the south line of Harrington Street and the north line of Hickory Avenue, and the sum of nine thousand, ninety-one and 78/100 dollars, representing assessment of costs of improvement against property of the Atlantic Coast Line Railroad Company abutting 2,483.5 feet on Chatham Street, between the north line of Hickory Avenue and the Southern corporate limits of the town of Sanford, and it is further

Considered, ordered and adjudged, that the Atlantic Coast Line Railroad Company pay the costs of this action, to be taxed by the clerk of this court."

The town of Sanford excepted and assigned as error the judgment as rendered, and appealed to the Supreme Court.

Rose & Lyon and Hoyle & Hoyle for plaintiff.

Williams & Williams and Seawell & McPherson for defendant, Town of Sanford.

CLARKSON, J. The statute under which these assessments are made has been construed by this Court in *Gunter v. Sanford,* 186 N. C., p. 452. The town of Sanford issued notices to the Atlantic Coast Line Railroad Company to show cause on 15 May, 1923, if any it had, why the assessments against the property for paving improvements should not be made final. Action at this time was stopped at the instance of plaintiff, by an injunction issued by Horton, J., and the assessments were not made. On appeal to this Court *(R. R. v. Sanford,* 186 N. C., p. 466), the injunction was dissolved. The decision reversing the court below was filed in this Court 14 November, 1923. The town of Sanford, without any notice or hearing, on 20 November, 1923, and before the case was certified to the Superior Court *(R. R. v. Sanford,* 188 N. C., 218), attempted to make the assessment final, and thereunder advertised the railroad company's property for sale. The railroad applied to and obtained from Midyette, J., a restraining order preventing a sale of its property and requiring that the town of Sanford give the notices and hearing required by chapter 15, Private Laws, Extra Session, 1921, sec. 5. From the judgment the town of Sanford appealed to this Court and the contention of the railroad was sustained. See *R. R. v. Sanford, supra.* The notices were then given, on 5 August, 1925, for a hearing on 15 August, and continued to 22 August, 1925, and on that date the assessments were made against plaintiff's property, totaling $10,795.07.

A synopsis of the pertinent portions of chapter 15, Private Laws, 1921, Extra Session, for a decision in the case, are as follows:

"Sec. 2. Provides that the board of aldermen shall before commencing the street work or improvement *estimate* the total cost.

"Sec. 3. Provides that such *estimated* cost shall become a lien on abutting property from the date of filing with the street committee.

"Sec. 4. Provides that when the work is completed the town engineer or other person or committee of the board of aldermen in charge of such work, shall make a report of the *total actual* cost of such improvement, and that the *estimated cost* shall be adjusted in accordance therewith, and this sum shall be and remain a lien on abutting property.

"Sec. 5. Provides for serving a written notice 'at least ten days before the final assessments provided for in this act are made,' with provisions as to the contents of such notice requiring all property owners to show cause, if any they have, why said assessments should not be made, and providing machinery for an appeal therefrom.

"Sec. 10. Provides that the assessments when made and determined shall bear interest at a specified rate *'from the date of final findings' by said board of aldermen as herein provided."*

The only question involved in this appeal is whether or not the town of Sanford can recover interest on certain paving assessments from the date of findings on 22 August, 1925, as final pursuant to section 10, ch. 15, Private Laws, Extra Session, 1921, which provides that such assessment shall bear interest "from the date of final findings by said board of aldermen as herein provided," or can it recover interest from 15 May, 1923, when such assessments would have been made final pursuant to proper notice except for the intervention of plaintiff by injunction restraining such action, which upon appeal to the Supreme Court was dissolved?

We think the clear language of the act means what it says, that the assessment shall bear interest "from the date of final findings," 22 August, 1925. It may be noted the record says: "Thereafter, on 22 August, 1925, the board of aldermen adopted the following ordinances, to wit: 'Order making final paving assessment.'" There is nothing in the statute giving a retroactive effect. In injunctive proceedings, an undertaking with sufficient sureties must be given for damages to the party enjoined that may be sustained by reason of the injunction being wrongfully issued. C. S., 854. *McAden v. Watkins,* 191 N. C., p. 105.

It appears in the record that "the defendant, town of Sanford, tendered the motion as appeared of record, to submit an issue as to what damage, if any, is the town of Sanford entitled to recover from the Atlantic Coast Line Railroad by reason of the restraining order issued in this cause by Horton, J., dated 14 May, 1923, before the actual signing of the final judgment in the cause. Motion continued to be heard at the next term of this court, to which plaintiff excepts." This matter is interlocutory and not before us. In the judgment below there is

No error.

RODNEY ARRINGTON v. CONTINENTAL LIFE INSURANCE COMPANY.

(Filed 16 March, 1927.)

Insurance, Life—Payment of Premiums—Waiver—Policies—Contracts.

A life insurance company may waive the strict conditions in its policy as to payment of premiums at stated periods, by accepting payment for arrearages, and thus restore the vitality or enforcement of the policy which otherwise would be void.

APPEAL by defendant from *Ward, J.,* at Fall Term, 1926, of HALIFAX. No error.

Action by plaintiff, the beneficiary named therein, upon policy of insurance issued by defendant upon the life of Pattie Arrington. The action was begun in the court of a justice of the peace of Halifax County, and was tried in the Superior Court of said county upon appeal from judgment rendered therein.

Issues submitted to the jury were answered as follows:

"1. Was the policy sued on four weeks in arrears at the time of the $3.00 payment on 23 March, 1926? Answer: Yes.

"2. Did the defendant waive the alleged lapse of the policy by reason of the alleged nonpayment of the premium? Answer: Yes.

"3. In what sum, if any, is the defendant indebted to the plaintiff? Answer: $185.00."

From judgment upon the foregoing verdict, defendant appealed to the Supreme Court.

Travis & Travis for plaintiff.
George C. Green for defendant.

CONNOR, J. The policy sued on in this action was issued 17 October, 1921. According to its terms, a weekly premium of twenty-five cents was due and payable thereon on or before each Monday during its continuance. It is provided in the policy that upon the failure of the insured to pay a weekly premium within four Mondays from the date on which it was due, the policy shall become void; however, should the death of the insured occur when any premium is in arrears not exceeding four Mondays, defendant will nevertheless pay the policy, subject to its conditions.

The insured, Pattie Arrington, died on 30 March, 1926. Plaintiff contended that on 23 March, 1926, all premiums had been paid on the policy up to and including 8 March, 1926; that on said date insured, who resided in Halifax, N. C., sent by mail to defendant, at its home office in Richmond, Va., a cashier's check for three dollars in payment of premiums then due and to become due thereafter up to and including 12 April, 1926; that said check was accepted by defendant as such payment and thereafter duly collected by defendant.

Defendant contended that the last premium paid prior to the death of insured was due on 8 January, 1926. It admitted that it received the check for three dollars on 23 March, 1926, and thereafter collected same, but denied that it accepted the check or the proceeds of same in payment of premiums then due and to become due thereafter. It contended that it held said sum of three dollars in suspense in accordance with the provisions of the policy, and that after the death of insured it returned said sum to plaintiff. Plaintiff testified that he had declined to accept defendant's check for three dollars, as tendered to him.

The first issue having been answered by the jury in the affirmative, the policy had lapsed prior to the receipt of the check for three dollars, on 23 March, 1926, and was therefore void at the date of the death of insured; plaintiff, the beneficiary named therein, cannot recover on the policy unless defendant waived provisions of the policy relative to the time and manner in which the premiums should be paid.

Defendant excepted to the submission by the court of the second issue, and also to instructions in the charge to the jury with respect to said issue. It contends that there was no evidence upon which the jury could answer the said issue in the affirmative, and that the burden upon said issue being on plaintiff, it was error to submit said issue and to instruct the jury with respect thereto.

There was evidence tending to show that the check for three dollars, payable to its order, was received by defendant on 23 March, 1926, and thereafter collected; that said check was accepted by defendant as an unconditional payment of all premiums due on the policy, from 8 March, 1926, up to and including 12 April, 1926; that said check was sent by insured and received by defendant in conformity with the course of dealing between them theretofore had with respect to the payment of premiums on said policy; that there was printed in the Premium Receipt Book, furnished by defendant to the insured, a notice to the effect that if premiums are paid when more than four weeks in arrears, they will be received by defendant, only on condition that insured is then in good health and sound bodily. There was evidence that insured was in good health and sound bodily on 23 March, 1926, the date on which the check was received. The insured suffered a stroke of apoplexy on 25 March, 1926, and died thereafter on 30 March, 1926.

In *Clifton v. Insurance Co.*, 168 N. C., 499, *Brown, J.*, says: "It is elemental law that the payment of the premium is requisite to keep the policy of insurance in force. If the premium is not paid in the manner prescribed in the policy, the policy is forfeited. . . . The insurer may waive such conditions, and the unqualified, unconditional receipt of a past-due premium is a waiver."

In *Murphy v. Insurance Co.,* 167 N. C., 334, *Hoke, J.,* says: "It is also held by well considered cases on the subject here and elsewhere that this provision as to forfeiture, being inserted for the benefit of the company, may be waived by it, and such a waiver will be considered established and a forfeiture prevented whenever it is shown, as indicated, that there has been a valid agreement to postpone payment or that the company has so far recognized an agreement to that effect or otherwise acted in reference to the matter as to induce the policy-holder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected, and that the forfeiture on that account will not be insisted upon."

A statement of the principle applicable in this case in the following words was approved by this Court in *Paul v. Insurance Co.,* 183 N. C., 159:

"A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." *Coile v. Commercial Travelers,* 161 N. C., 104; *Ins. Co. v. Eggleston,* 26 U. S., 577; *Ins. Co. v. Norton,* 96 U. S., 234.

Defendant's assignments of error cannot be sustained. There was no error in the submission of the second issue, or in the instructions of the court with respect to said issue. The instructions are well supported by authoritative decisions of this Court. The judgment is affirmed. There is

No error.

PEARL GILLIS, BY HER NEXT FRIEND, v. TRANSIT CORPORATION OF NORFOLK.

(Filed 16 March, 1927.)

1. **Pleadings—Negligence.**

Where damages are sought in an action on the ground of defendant's negligence, the fact of negligence must be so specifically alleged as to afford the defendant opportunity to reply, and a broad allegation of negligence is insufficient.

2. **Negligence—Automobiles—Highways—Violation of Statutes—Causal Connection—Negligence Per Se.**

While it may be negligence *per se* to drive an auto-vehicle on the wrong side of a public highway, and at a speed prohibited by statute (Public Laws 1924, Extra Session, ch. 61, sec. a), the negligence to be actionable must have a causal connection with the injury inflicted.

3. **Same—Accident—Defense—Proximate Cause.**

Where a defense in an action to recover damages for the defendant's negligence is that the injury in suit was attributable to an accident, any negligence on the part of the defendant which was the proximate cause of the injury, will overthrow the defense set up.

4. **Negligence—Automobiles—Statutes—Rules of the Road—Instructions—Substantial Compliance—Appeal and Error.**

An instruction as to the requirements of motor vehicles passing to the right of others met upon the public highways need not be in the exact language of our statute, Public-Local Laws of 1924, Extra Session, ch. 61, sec. a, if when considered in connection with allegations of the complaint and evidence, it is in substantial compliance therewith.

5. **Damages—Negligence—Instructions—Minority—Parent and Child—Appeal and Error.**

An instruction as to the amount of compensatory damages past, present and prospective, the plaintiff is entitled to recover, caused by the defendant's negligence, is erroneous that does not take into consideration the minority of the plaintiff, suing by her next friend, without evidence of the parent's emancipation of the child.

APPEAL by defendant from *Ward, Special Judge,* at October Term, 1926, of HALIFAX.

George C. Green for plaintiff.
John W. Hester and Travis & Travis for defendants.

ADAMS, J. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the negligence of the defendant. She introduced evidence tending to show that about 8 p.m. on 12 June, 1926, she was going from Halifax to Weldon in a Dodge sedan owned by her father and driven by another; that her father and her brother were on the front seat with the driver and that she, Mrs. Marks, and two others occupied the seat in the rear; that the car passed over a bridge and came to a stop on the right side of the road; and that the defendant's bus, moving in the opposite direction, came round the curve at the rate of forty or forty-five miles an hour, struck the car, hurled it against the bridge, and injured the plaintiff.

There was evidence for the defendant tending to show that the speed of the bus, when approaching the bridge, did not exceed fifteen miles an hour; that the driver had the bus under control, gave the usual signals and observed due care; that the sedan came down the opposite hill very rapidly, ran upon the bridge "more than midway the road," lurched, swerved toward the other side, and caused the collision.

There was no plea of contributory negligence, and the two issues of negligence and compensatory damages were answered in favor of the plaintiff, for whom judgment was accordingly given.

With respect to negligence the allegations are these: (1) "When the car in which the plaintiff was riding had crossed the second branch between Weldon and Halifax, known as Dry Pond Branch, the car stopped on the extreme right-hand side of the highway to await the passing of the bus of the defendant, which was approaching at a rapid and unlawful rate of speed, to wit, between 40 and 45 miles per hour; (2) that the defendant's bus was being driven at an unlawful rate of speed and was negligently, wantonly and recklessly driven into the car in which the plaintiff was riding, wrecking the car and injuring the plaintiff; (3) that the defendant was guilty of gross, wilful, criminal and wanton negligence and was utterly and criminally indifferent to the rights of the plaintiff."

An allegation of negligence must be sufficiently specific to give information of the particular acts complained of; a general allegation without such particularity does not set out the nature of the plaintiff's demand sufficiently to enable the defendant to prepare his defense. *Conley v. R. R.*, 109 N. C., 692; *Lassiter v. Roper,* 114 N. C., 17. Under this principle the only specific allegations of negligence are that the bus was driven at an unlawful rate of speed and on the wrong side of the road at the time of the collision. As to the latter allegation this instruction was given the jury: "If a person in operating a motor vehicle hits another car or person to the left of the center of the road in the direction he is going, that of itself is negligence, irrespective of the speed of the car." The appellant excepted. The instruction was not given in the terms of the statute, but when considered in connection with the allegations and the evidence, we cannot say that it constitutes reversible error. The amended statute is: "That all operators of motor vehicles on the public roads, in meeting a motor vehicle in operation, shall pass on the right of the road in such a manner that all said vehicles, and the load thereof, shall be on the right of the center of the road." Public Laws 1924, Extra Session, ch. 61, sec. a. The breach of a statute is negligence *per se,* but there must be a causal connection between the disregard of the statute and the injury inflicted. *Ledbetter v. English,* 166 N. C., 125. After giving the foregoing instruction and referring to the statute regulating the rate of speed, the judge properly instructed the jury as to negligence in each respect and applied the doctrine of proximate cause to each phase of the alleged negligence.

The eighth exception is without merit. The first part of the instruction to which it is addressed has reference to the question whether the collision was an accident, and lays down the implied proposition that it was not an accident if the defendant was negligent in any particular, which is correct; and the second part is addressed to the sole negligence of the driver of the Dodge car. If the collision was due solely to his negligence, of course it was not due to any negligence on the part of the defendant. So with respect to exceptions 15½ and 17.

The appellant says the trial court failed to tell the jury that in order to recover the plaintiff must prove the particular acts of negligence set out in the complaint; but the evidence points only to the two phases alleged in the complaint, and we do not see that the jury could have been misled in this respect. Besides, the issue was confined to "the negligence of the defendant as alleged in the complaint." The instruction concerning "any degree of causal negligence" is sustained in *Earwood v. R. R.,* 192 N. C., 27, and *White v. Realty Co.,* 182 N. C., 536.

The appellant complains that the jury was not instructed to answer the issue as to negligence in the negative unless it was found that the sedan had stopped on the right hand side of the road and was struck by the bus while in that position. There was evidence tending to show that the car had stopped, also that it was slowly moving; and paragraphs 3 and 4 of the complaint are sufficient to cover these two phases of the evidence. The instruction was therefore properly refused.

There was error, however, in the instruction as to the measure of damages. At the trial two other suits were tried with the one now under consideration, one being that of Jennie S. Marks. The instruction complained of was as follows: "The measure of damages which I will lay down to you controls the second issue (as to the compensatory damages of Mrs. Marks) and the fifth issue (as to the compensatory damages of the plaintiff), because the measure of damages is the same in each case. If either of these plaintiffs is entitled to recover at all she is entitled to recover one compensation in a lump sum for all damages, past and prospective, which are the immediate results of the negligence of the defendant. These are said to embrace loss of bodily or mental powers, suffering both body and mind, decreased capacity for labor, loss of time, medical expenses, and nursing expenses."

The plaintiff is a minor, and there is no evidence of her emancipation, but the jury was permitted to consider as an element of damages for the injury suffered both her loss of time and her diminished earning capacity during her minority. A statement of the opposite principle with citation of authorities is given in *Shipp v. Stage Lines,* 192 N. C., 475. For this error there must be a

New trial.

A. T. GRIFFIN MANUFACTURING COMPANY v. T. B. BRAY ET AL.

(Filed 16 March, 1927.)

1. **Evidence—Telephone Conversations—Principal and Agent—Representations.**

   In order to bind an alleged partnership for a contract of purchase made by a supposed copartner by telephone, it is necessary to identify by the voice of the party speaking and representing himself to be a member of the firm, when sole reliance is made thereon; and evidence that the witness was uncertain thereof, but that the speaker representing himself as such, is alone insufficient to take the case to the jury.

2. **Mechanics' Liens—Liens—Municipal Corporations—Contracts—Principal and Agent—Evidence.**

   A material furnisher to a subcontractor, who has used the material in the construction of a public school building, can acquire no lien on the building, and where the contractor has been found by the verdict of the jury not to be liable, the materialman cannot recover the amount withheld by the school board in settlement with the contractor on account of the pendency of the litigation, on the ground that the material was so used.

CIVIL ACTION, before *Cranmer, J.*, at August Term, 1926, of CHATHAM.

The plaintiff sold material for a public school building in Siler City. The defendant, T. B. Bray, and others compose the board of education of Chatham County, and the defendant, C. N. Bray, is chairman of the board of school trustees of Siler City.

The evidence tended to show that the material was shipped to the North State Covering Company and not to the contractors, Hancock & Davis, but the contention of the plaintiff was that E. F. Eure, who was trading as the North State Covering Company, bought the material as agent for the contractors, Hancock & Davis. The agency of Eure was denied by the contractors. The evidence further showed that the school board retained in its possession the sum of $1,350.32, which was the balance due on plaintiff's claim.

The following issue was submitted to the jury:

What sum, if any, are the defendants, Hancock & Davis, indebted to the plaintiff, A. T. Griffin Manufacturing Company?

The jury answered the issue, No.

Judgment was thereupon entered in favor of the defendant, and the plaintiff appealed.

Siler & Barber and Dickinson & Freeman for plaintiff.

C. R. Wheatly, and Ruark & Fletcher for defendants.

BROGDEN, J. What is the law with respect to the admissibility and competency of telephone conversations?

The question of law raised by the record is based upon the following excerpt from the record:

"In regard to the telephone conversation with Hancock & Davis about some of this material, go ahead and state what happened?"

(A). "I had a phone call, and a gentleman that said it was Mr. Davis, and whose voice I had no right to doubt, said to ship him"—the defendants, Hancock and Davis objected on the ground that the witness had not qualified as being familiar with Mr. Davis' voice, whereupon the witness, upon being further questioned, stated—"I think I had met Mr. Davis the first time in May of that year, and I had heard him talk quite a bit. I would not say that I would know his voice over the telephone. Whoever it was at the other end of the phone said he was Mr. Davis, and he further identified himself by saying that he was of the firm of Hancock & Davis. There was nothing about his voice that led me to believe that it was any other person than Mr. Davis and I think it was he."

"The courts of justice recognize the useful intercommunication in modern life of the telephone. They are now installed in almost every home and place of business. They have become a necessity, as a medium to the conduct of business." *Clarkson, J.*, in *Sanders v. Griffin,* 191 N. C., 450. Dean Wigmore in his Treatise on Evidence, 2 ed., sec. 2155, declares: "It is generally conceded that a person may be recognized and identified by his voice if the hearer is acquainted with the speaker's voice. . . . No one has even contended that, if the *person first calling up* is the very one to be identified, his mere purporting to be A is sufficient, any more than the mere purporting signature of A to a letter would be sufficient."

The same principle is declared in *Atlantic Coast Realty Co. v. Robertson, Exrs.,* 135 Va., 247, as follows: "So far as the rule has been formulated, it is that they are (telephone conversations) governed by the same general rules of evidence which govern the admission of oral statements made in original conversations, except, of course, *that the party against whom the conversation is sought to be used must be identified;* but the identity of the other party to the conversation may be established either by direct or circumstantial evidence." *Lumber Co. v. Askew,* 185 N. C., 87.

The whole question, therefore, resolves itself into the inquiry as to whether or not there was sufficient identity of Mr. Davis to render the conversation competent and admissible as against him.

The plaintiff testified: "I could not say that I would know his voice over the telephone. Whoever it was at the other end of the phone said he was Mr. Davis, and he further identified himself by saying that he was of the firm of Hancock & Davis."

We are of the opinion that the evidence was inadmissible and properly excluded from consideration by the jury, for the reason that there was not such identity of the party charged with liability as contemplated by law.

The plaintiff contends, however, that the contractors, Hancock & Davis, should be held liable at all events, because the material was actually used in the building. The record does not disclose that any surety bond was given for the performance of the contract as required by C. S., 2445 and amendments thereto. Under the decisions of this Court no lien could be acquired upon the school building, and, as no bond was given, the plaintiff's remedy is against the contractors, Hancock & Davis, or E. F. Eure, trading as North State Covering Company, to whom the material was sold. *Warner v. Halyburton,* 187 N. C., 414; *Noland v. Trustees,* 190 N. C., 250; *Robinson Mfg. Co. v. Blalock,* 192 N. C., 407.

The liability of Hancock & Davis, the contractors, was submitted to the jury and the jury has answered the issue against the plaintiff. Eure, trading as North State Covering Company, was not a party to the action, and we discover no error in the trial of the cause.

No error.

MATTIE J. GILLIKEN, EXECUTRIX, ET AL. v. GEORGE D. NORCOM ET AL.

(Filed 16 March, 1927.)

Removal of Causes—Transfer of Causes—Local Prejudice—Courts—Discretion—Appeal and Error.

Where a party moves for the removal of a cause to another county than the one in which it had been brought, upon the grounds that he cannot obtain a fair and impartial trial therein, C. S., 471, 472, and upon affidavits filed therein that the case had been generally discussed and that the movant could not proceed therein and obtain an impartial trial, upon which the judge so finds the facts, the order removing the case according to the requirements of the statute is within his sound discretion, and not reviewable on appeal, though he further states in his order that his findings were based on his personal observation.

CIVIL ACTION, before *Stack, J.,* at December Term, 1926, of CARTERET.

This was a civil action instituted for the purpose of setting aside a deed made to the defendant by the testatrix of the plaintiff. In apt time a motion for removal was made by the plaintiff upon the ground that "a fair and impartial trial of the action cannot be had in Carteret County." Affidavits were filed by both parties to the controversy, and at the hearing upon the motion the following judgment was rendered, removing the case to Craven County:

"This cause, by consent of the parties, coming on to be heard in Greene County, and being heard upon the plaintiffs' and defendants' affidavits to remove the case to another county, the court finds that there are probable grounds to believe that a fair and impartial trial of the action cannot be had in Carteret County, and the court came to this conclusion upon personal observation during his term of court there and while trying two causes between these parties, to wit, Gilliken, Norcom *et al.,* concerning personal property and Gilliken and Norcom, etc., concerning real estate; and it is found as a fact that the surrounding circumstances are such and the court is of the opinion that a fair and impartial trial cannot be had in Carteret County:

It is further found as a fact that the case has been discussed to such an extent that it would be difficult to find a sufficient number of jurors who have not formed an opinion in the cause, and in order that the ends of justice would be promoted by the change, it is, therefore, ordered, considered and adjudged that the cause be removed to Craven County for trial, State of North Carolina, and that the clerk of the court of Carteret County send the original papers and a certified copy of this order to Craven County, and that further proceedings be had according to law."

Abernethy & Abernethy, M. Leslie Davis and Ward & Ward for plaintiff.

C. R. Wheatley and J. F. Duncan for defendant.

BROGDEN, J. Is an order of removal upon the ground that a party cannot secure a fair and impartial trial reviewable in the Supreme Court?

The plaintiff asked for removal of the cause under C. S., 471 and 472. Affidavits were filed in behalf of plaintiff, reciting in substance that the case had been discussed generally in Carteret County to such an extent that "the whole population have formed or expressed an opinion one way or the other." A large number of affidavits were filed in behalf of defendants, contradicting and controverting the affidavits filed by the plaintiff and asserting that a fair trial of the cause could be had in the county in which the action was instituted. The order of removal recites: "The court finds that there are probable grounds to believe that a fair and impartial trial of the action cannot be had in Carteret County, and the court came to this conclusion upon personal observation during his term of court there while trying two cases between these parties." The statutes upon which the motion is based contemplates that affidavits for removal must "set forth particularly in detail the ground of the application." The rule of law governing motions for removal for the causes specified, is thus declared in *Phillips v. Lentz,* 83 N. C., 240: "The distinction seems to be where there are no facts stated in the affidavit as grounds for the removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final." *S. v. Smarr,* 121 N. C., 672; *S. v. Turner,* 143 N. C., 641; *Garrett v. Bear,* 144 N. C., 23; *Oettinger v. Live Stock Co.,* 170 N. C., 152; *Byrd v. Spruce Co.,* 170 N. C., 429.

In *Oettinger v. Live Stock Co., supra,* the rule was declared to be: "The Supreme Court will not review the denial of the Superior Court judge of a motion to remove for the convenience of witnesses or for that the ends of justice will be promoted." To the same effect is the rule declared in *Byrd v. Spruce Co., supra, Justice Allen* observing: "The motion to remove the action for trial to another county in the interest of justice was addressed to the discretion of the court and is not reviewable."

Applying these rules of law, it appears from the record that, while the judge stated in the order of removal, "the court came to this conclusion upon personal observation," etc., yet the order of removal further recites "and it is found as a fact that the surrounding circumstances are such and the court is of the opinion that a fair and impartial trial cannot be had in Carteret County." It is further found as a fact "that the case has been discussed to such an extent that it would be difficult to find a sufficient number of jurors who have not formed an opinion in the cause," etc.

It is apparent, therefore, that the trial judge found sufficient facts to warrant the removal and that sufficient facts appeared in the affidavits to support the finding and order. The judgment is

Affirmed.

E. H. AND M. F. WALLER v. C. A. DUDLEY, JR.

(Filed 16 March, 1927.)

1. **Appeal and Error—Time Agreed for Settlement of Case—Rules of Court—Order of Court—Certiorari—Motions.**

Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and countercase, etc., that will prevent its being docketed in the time prescribed by Rule 5, regulating the docketing of appeals, and consequently no case has been yet settled by the trial judge, appellant's motion in the Supreme Court for a writ of *certiorari* will be denied.

2. **Supreme Court—Certiorari—Discretion—Appeal and Error—Rules of Court—Practice.**

The granting or refusal of a motion for a *certiorari* to bring up a case to the Supreme Court for review, when not contravening the fixed and uniformly applied rules of the Court, is within the discretion of that Court.

MOTION for *certiorari* to have case brought up from LENOIR Superior Court and heard on appeal.

Shaw & Jones for defendant, movant.

STACY, C. J. This was an action in trespass to recover damages for an alleged wrongful cutting of plaintiff's timber. A question of boundary being involved, the cause was referred under the statute to Hon. D. M. Clark, who found the facts and reported same, together with his conclusions of law, to the court. In said report, the dividing line between the lands of the plaintiffs and the defendant was established and the plaintiffs awarded $796 as damages for the wrongful cutting of their timber by the defendant. On exceptions duly filed and demand for a jury trial, issues were submitted at the November Term, 1926 (which convened 9 November and continued for two weeks), Lenoir Superior Court, Hon. W. A. Devin, judge presiding, and answered as follows:

"1. Did the defendant trespass upon the lands of the plaintiffs and cut and remove therefrom cord wood and timber trees as alleged? Answer: Yes.

"2. If so, what damages, if any, are plaintiffs entitled to recover? Answer: $450.00."

From a judgment on the verdict in favor of plaintiffs, the defendant gave notice of appeal to the Supreme Court. By consent of counsel and by order duly entered in the cause, the defendant was allowed sixty days within which to prepare and serve statement of case on appeal, and the plaintiffs were allowed sixty days thereafter to file exceptions or counter statement of case. This application for *certiorari* was made 8 March, 1927, for the reason "that said case on appeal has not yet been settled."

The defendant served his statement of case on appeal 19 January, 1927, and it does not appear that the plaintiffs have filed any exceptions or counter statement of case, the time for doing so not having expired when the motion for *certiorari* was made in this Court. There is nothing on the record to suggest the necessity of any unusual time in preparing the case on appeal.

Under our settled rules of procedure an appeal from a judgment rendered prior to the commencement of a term of the Supreme Court must be brought to the next succeeding term; and, to provide for a hearing in regular order, it is required that the same shall be docketed here fourteen days before entering upon the call of the district to which it belongs, with the proviso that appeals in civil cases (but not so in criminal cases) from the First, Second, Third and Fourth Districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument. Rule 5, vol. 192, p. 841.

We again call the attention of the profession to the fact that the rules governing appeals are mandatory and not directory. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. *Finch v. Comrs.,* 190 N. C., 154. The single modification sanctioned by the decisions is that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for *certiorari,* which motion may be allowed by the Court in its discretion, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right. *S. v. Farmer,* 188 N. C., 243.

Nor is the situation bettered when the time for serving statement of case on appeal and exceptions thereto or counter statement of case is enlarged by order of the judge trying the case as he is authorized, in his discretion, under C. S., 643, as amended by chapter 97, Public Laws 1921, to do, for this statute gives him no more authority to abrogate the rules of the Supreme Court than litigants or counsel would have to impinge upon them by consent or agreement. *Cooper v. Comrs.,* 184 N. C., 615.

For the convenience of counsel, litigants and the Court, a fixed schedule is arranged for each term and a time set apart for the call of the docket from each of the judicial districts of the State. The calls are made in the order in which the districts are numbered. It can readily be seen, therefore, that, unless appeals are ready for argument during the time allotted to the district from which they came, it necessarily works a disarrangement of the calendar, and this not infrequently results in delay and sometimes in serious inconvenience. The work of the Court is constantly increasing, and, if it is to keep up with its docket, which it is earnestly striving to do, an orderly procedure, marked by a strict observance of the rules, must be maintained. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties. *Battle v. Mercer,* 188 N. C., 116. The rules have been revised and annotated and are republished in the 192nd Report.

It will be observed that the defendant in the present case by agreeing to such a long extension of time and by taking practically the full sixty days allowed to him for preparing and serving his statement of case on appeal, thereby put it out of his power to have the case ready for hearing as required by the rules of the Supreme Court. Like situations were presented in the recent cases of *Trust Co. v. Parks,* 191 N. C., 263, and *Finch v. Comrs.,* 190 N. C., 154, where similar motions were denied. See, also, *S. v. Surety Co.,* 192 N. C., 52.

Certiorari disallowed.

J. W. ELLIS, ADMINISTRATOR OF BENNIE HIGHTOWER ELLIS, v. THE CAROLINA POWER AND LIGHT COMPANY.

(Filed 16 March, 1927.)

1. **Evidence—Nonsuit.**

Upon a motion as of nonsuit under our statute the evidence is to be taken in the light most favorable to the plaintiff, with every reasonable intendment, and every reasonable inference to be drawn therefrom.

2. **Negligence—Electricity—Dangerous Instrumentalities.**

Those who furnish electric light and power are held to a high degree of care, commensurate with the dangerous character of the instrumentality in the erection and inspection of the poles and wires carrying a deadly current of electricity, which they transmit and furnish to the public for compensation.

3. **Evidence — Negligence — Nonsuit—Instructions—Electricity—Dangerous Instrumentalities.**

Evidence that the 9-year-old intestate of plaintiff was found dead with the uninsulated end of the defendant electric company's live wire in his hands; that this was on an abandoned side line connected with the main line carrying a deadly voltage, and ran some fifteen feet from a frequented pathway used by the family of the intestate, which the intestate had used on this occasion in going home from Sunday school; that on prior occasions these wires had shocked others, and the defendant should have known thereof by reasonable inspection, and that close to the place where the intestate's hands had clasped the deadly uninsulated wire there was a glass insulator around which the wire had been wrapped, and which was on a rotten cross-arm that had been supported by the pole, is *held* sufficient to take the case to the jury upon the defendant's motion as of nonsuit, and to deny its request for a peremptory instruction in its favor upon the issue of actionable negligence.

APPEAL by defendant from *Cranmer, J.*, and a jury, at September Term, 1926, of JOHNSTON. No error.

Necessary facts stated in the opinion.

Wellons & Wellons for plaintiff.

W. L. Currie, Pou & Pou and Abell & Shepard for defendant.

CLARKSON, J. This is an action for actionable negligence brought by plaintiff, administrator of his son, Bennie, against defendant for causing his son's death, he being electrocuted by coming in contact with a live wire belonging to defendant company.

The issues were the usual ones in a case of this kind. All were answered in plaintiff's favor and damages awarded.

The sole question presented by the defendant's assignments of error in this appeal is: Whether or not his Honor erred in refusing to grant defendant's motion to nonsuit at the close of plaintiff's evidence, and again at the close of all the evidence, and in refusing to grant defendant's prayer for peremptory instruction that the jury should answer the issue as to defendant's negligence "No."

On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The material facts are: The State had moved its State School for the Blind from inside to the outskirts of Raleigh, near Pullen Park. The grounds, although somewhat rough and rocky, all the underbrush had been cut out. Into these grounds and grove defendant power company ran a switch line from its main line to furnish electricity to the persons and companies that had contracted to construct the buildings. The side line was put into the school grounds about 1917, when a contract was made to build three buildings, then the World War came on. In May, 1923, a gymnasium and swimming pool was being built on the school grounds, but the power line was not being used at the time and had not been used for six or eight months. The power was transmitted in the open school grounds on three poles, in the usual way. J. W. Ellis, the father of Bennie, had been living in a house on the grounds about a month and a half before the killing and was working on the farm. The switch line ran near the house plaintiff was living in and went up in the school grounds in the grove. The boy was killed near the pole between the pole the transformer was on and the main line. W. R. Hart, who was excavating for the swimming pool, caused a stump to be blown up and a part of it came down between the two poles and cut the wires in two and they fell on the ground. This was Thursday, 3 May. After this, Mr. Hart, with some gloves on his hands, and on a horse, tied the wires back 12 or 15 feet above the ground, in order to get around that pole with his teams. The wires were 30 or 40 yards from the gymnasium where the swimming pool was located. Workmen noticed the wire being down on the side of the pole in passing. On Saturday, about 10 o'clock a.m., a negro man working with other hands, passing in some way got knocked down and shocked by the wire, "the negro 'staggered' around there."

The pole where the plaintiff's son was electrocuted was about 100 feet from the transformer pole. There were no weeds or undergrowth around the pole where he was killed. On Sunday, 6 May, about 9 o'clock in the morning, plaintiff's son, Bennie, about 9 years of age, went to Sunday school. On his way he had to pass the death place, which was about 60 to 75 yards from his home. On his way he went along a *pathway,* 12 or 15 feet from the live wires hanging down on the ground and the ends 6 or 7 inches uninsulated. After Sunday school he started back to his home. About 11 o'clock he was found lying three feet from the pole dead, with the end of the wire uninsulated in his right hand. There were two wires down, one small one and one large one, he had the larger one in his hand. The wires were hanging down from the top of the cross-arm position of the power line pole, and both of the wires were on the ground. The end of the wire, for 6 or 7 inches, was not insulated; this end the boy had in his hand. The other wire that was on the ground was attached to the end, a pin with glass on it, and the wire was fastened around the glass; 6 or 7 inches of the wire was beyond the insulation. The cross-arm that had been on the transformer pole was lying on the ground at the foot of the pole. "It was rotten and the pins had fallen out. There was one pin on one of the wires, and the rest of the pins had fallen out of the arm on the ground, and was lying around the arm." Something like half an hour after the boy was found electrocuted the power was cut off. A witness testified that he "could hear the meat frying in his hand," as he lay on the ground dead with the wire in his hand. The negative evidence was that no one was ever seen to repair or inspect the line.

Was there sufficient evidence—more than a scintilla—to go to the jury? In our opinion there was.

From the evidence, the place where the death occurred was on the new grounds of the State School for the Blind. These grounds had been cleared up and three buildings erected on it. Plaintiff and his family, including the boy that was killed, was living in a house on the grounds, and laborers with their teams were working on the grounds. The defendant company had not used this side-line for 6 or 8 months, yet this dead end was heavily charged with electricity, by inference some

2300 voltage—sufficient to kill. The wires so charged were lying on the ground for several days within 12 or 15 feet from the path leading to and from plaintiff's home. A negro was knocked down by the live wire on Saturday before the young boy was electrocuted on Sunday, in the presence and well known to the workmen. Lying on the ground was the glass on which was the wire heavily charged, near the pathway; this, as a matter of common knowledge would attract a child and the natural consequence to pick it up.

Under the facts and circumstances of this case, we think there was sufficient evidence of negligence, more than a scintilla, to be submitted to the jury, and no evidence of contributory negligence.

In *Graham v. Power Co.,* 189 N. C., at p. 381, we gave a synopsis of the decision in *Haynes v. Gas Co.,* 114 N. C., 203, as follows: "In *Haynes v. Gas Co.,* 114 N. C., 203, *Burwell, J.,* it was held that John W. Haynes, about 10 years of age, who was 'a very healthy, intelligent, moral and industrious boy, well educated for his age,' who was killed by taking hold of a 'live wire,' on or near the sidewalk over which he was passing in the city of Raleigh—the principle of *res ipsa loquitur* applied. 'A complete prima facie case of negligence was made out,' . . . and 'we are clearly of the opinion that there was no evidence of contributory negligence.' "

In the *Haynes case,* the live wire was on or near the sidewalk; here it was in open grounds near a pathway accustomed and necessary to be traveled for ingress and egress.

"The owner or operator of an electric plant is bound to exercise a reasonable degree of care in erecting pole lines, selecting appliances, *insulating the wire wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection* by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, *which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered.* It would hardly do to say that the defendant can only be required to exercise due diligence after it received notice of any defect in its appliances or of any change in the physical conditions surrounding them, for this would be placing a premium upon negligent ignorance." (Italics ours.) *Bourke v. Butte Elec. & Power Co.,* 33 Mont., 267, 83 Pac., 473. See *Tackett v. Henderson,* 12 Cal. App., at p. 663.

In *Love v. Power Co.,* 86 W. Va., at p. 397, citing numerous authorities, it is held: "A company maintaining electric lines over which a current of high voltage is carried is bound to exercise the necessary care and prudence to prevent injury at places where others have the right to go either for *work, business or pleasure.*"

In *Benton v. Public-Service Corp.*, 165 N. C., at p. 356, *Brown, J.*, said: "It is well settled by the decisions of this and other courts that those who deal in electricity, and furnish it for use, are held to the highest degree of care in the maintenance and inspection of their wires through which the electric current passes."

It is said in *Alabama City G. & A. Ry. Co. v. Appleton,* 54 Sou. Rep. (Ala.), p. 640: "It is also the duty of such company to make reasonable and proper inspection of its appliances. This duty does not contemplate such inspection as would absolutely forestall injuries. Whether in a given case the duty to inspect, as reasonable care, prudence and foresight would suggest, has been performed is a question for the jury to determine under all the facts and circumstances of the event. 1 Joyce, sec. 438B, and notes thereto."

"The danger is great and care and watchfulness must be commensurate to it." *Haynes v. Gas Co., supra.*

"In *Ins. Co. v. Boone,* 95 U. S., 117, it is said: 'The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. . . . The inquiry must always be whether there was an intermediate cause disconnected from the primary fault and self-operating, which produced the injury.' *Inge v. R. R.,* 192 N. C., at p. 530. 'A cause that produced the result in continuous sequence and without which it could not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under the facts as they existed. *Ramsbottom v. R. R.,* 138 N. C., 38.' *Lea v. Utilities Co.,* 175 N. C., at p. 463. In *Hudson v. R. R.,* 176 N. C., p. 492, *Allen, J.,* confirming the above rule, says: 'To which we adhere, with the modification contained in *Drum v. Miller,* 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act.' *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., 647." *Clinard v. Electric Co.,* 192 N. C., at p. 740.

It may not be amiss to note that the *Haynes case,* so ably written by *Justice Burwell,* one of the greatest of this Bench, is quoted over the nation as a leading case in regard to the duty and measure of care resting on and required of electric companies. Those who are engaged in the electrical business are held by the courts to the highest degree of care in the manufacture, distribution, maintenance and inspection.

Lying on the ground, almost in the frequented path that the young lad, 9 years old, had to travel to and from his home, was this invisible, deadly live current in the wire, within 6 or 7 inches from its end uninsulated. This deadly wire was taken hold of by the young lad and produced instant death—2300 voltage. It lay there, perhaps several days, like a serpent. The rattle-snake warns its victim, but not so with this subtle, invisible and death-producing power. It is a matter of common knowledge that this wonderful force is of untold benefit to our industrial life. Electric power is an industry-producing agency, and the hydro-electric development has been one of the greatest factors in the State's progress, and especially its industrial expansion. Every legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes and elsewhere. On the other hand, the highest degree of care should be required in the manufacture and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power.

The charge of the court below is not in the record. The presumption is that the court below charged fully the law applicable to the facts.

The matter has been discussed recently by this Court and numerous cases are cited in *Graham v. Power Co., supra.* An interesting case has been recently written by *Whitfield, J., Starke v. Holtzclaw,* 105 Sou. Rep. (Fla.) (25 July, 1925), p. 330, citing authorities applicable.

For the reasons given, there is

No error.

NORTH CAROLINA RAILROAD COMPANY v. C. D. STORY, SHERIFF OF ALAMANCE COUNTY, NORTH CAROLINA, AND P. M. KING, ADMINISTRATOR OF MAGGIE BARBER, DECEASED.

(Filed 16 March, 1927.)

1. **Judgments—Railroads—Carriers—War—Execution—Res Judicata.**

The Federal Control Act of 29 August, 1916, does not forbid a judgment being taken against a carrier for injury caused by its negligent act in the operation of its railroad by the Government during war conditions, but only an execution and levy against its property, which cannot take place until after judgment, and this cannot be considered as *res judicata* in the action in which the judgment against the carrier had been rendered, the remedy being under the Federal Statute of 1920.

2. **Courts—Railroads—War—Federal Courts.**

The decision of the Supreme Court of the United States is controlling over that of the State court upon the issuance of levy and execution against the property of a railroad, under a judgment rendered as to the time the railroad was in control of the government as a war measure.

APPEAL by defendants from *Bryson, J.*, at March Term, 1927, of GUILFORD. No error.

Facts: On 21 March, 1921, P. M. King, as administrator of Maggie Barber, recovered a judgment for $2,500 in the Superior Court of Guilford County, against the North Carolina Railroad Company for the negligent killing of his intestate. This judgment not being paid, the said administrator on 8 February, 1922, brought an action upon this judgment in said Superior Court, and at April Term, 1922, said court rendered judgment in his favor against the defendant therein (the present plaintiff) for $2,595.65, interest and costs. The North Carolina Railroad Company appealed from said judgment to this Court where, on 29 December, 1922, it was affirmed (184 N. C., 442). There was nothing done by the present plaintiff to have this judgment reviewed by the Supreme Court of the United States.

At March Term, 1923, of said Superior Court, Hon. A. M. Stack, judge presiding, made an order in said case, pursuant to C. S., 659. It recited that the judgment therein had, upon appeal, been affirmed by this Court, and gave judgment directing and ordering that execution of said judgment do proceed. The North Carolina Railroad Company thereupon caused the following entry to be made on the record: "From the above judgment the defendant appeals to the Supreme Court, said defendant resisting and objecting to the signing of said judgment. Notice of appeal waived. Appeal bond fixed at $50.00." No further steps were taken to perfect this appeal.

Thereafter, in April, 1923, P. M. King, administrator, pursuant to said order, sued out an execution from said Superior Court upon said judgment, and delivered the same to C. D. Story, sheriff of Alamance County, who, acting thereunder, levied upon certain real property of the North Carolina Railroad Company in Alamance County and advertised the same for sale in the manner provided by law, to satisfy said execution.

On 5 May, 1923, the North Carolina Railroad Company brought the present action against C. D. Story, sheriff, and P. M. King, administrator, for an injunction against further proceedings under said execution. It alleged certain facts, as to the former litigation between said administrator and itself, stating that the North Carolina Railroad Company had property in Alamance County subject to execution and claiming that its said property was exempt from execution upon the judgment in which it was issued by virtue of various acts of Congress of the United States; it further alleged as grounds for injunction relief the provisions of the Federal Control Act and of the Transportation Act (1920), and especially section 206g. All these matters had been set up and relied upon by the North Carolina Railroad Company in its answers filed in the two former actions between P. M. King, administrator, and itself, in which judgments had been rendered against it. The prayer was that an order issue restraining and permanently enjoining defendants from taking any further steps to satisfy the execution. On said 5 May, 1923, plaintiff herein applied to Harding, J., then by exchange presiding over Guilford Superior Court, and obtained from him an order for the defendants to show cause before Shaw, J., at Winston-Salem on 22 May, 1923, why an injunction should not be issued restraining them from taking any further steps to satisfy said execution, and in the meantime restraining them from any further action under the said execution until the return day. On 17 May, 1923, defendants answered, and among other things they alleged: "That all the matters and things alleged in the complaint as grounds for injunction or other relief in the present action have been heretofore adjudicated between the plaintiff and the defendant, P. M. King, administrator of Maggie Barber, deceased, both by the Superior Court of Guilford County and by the Supreme Court of North Carolina, and are as between them *res adjudicata* and cannot be again litigated in the present action."

On 22 May, 1923, Judge Harding's order to show cause was heard at Winston-Salem, before Shaw, J., who thereupon ordered and adjudged "that the motion of plaintiff to continue and make permanent the temporary restraining order issued by Judge Harding be, and it is hereby denied." The plaintiff appealed from the order of the Superior Court. This order, on 20 February, 1924, was affirmed by this Court, 187 N. C., 184.

Upon writ of *certiorari* the Supreme Court of the United States reviewed the judgment of this Court and reversed it, remanding the cause "for further proceedings not inconsistent with the opinion of the Supreme Court of the United States." When the mandate of the Supreme Court of the United States was filed in this Court, King, administrator, filed a motion, and upon that motion the Court heard oral argument, and thereafter directed that the cause be certified to the Superior Court of Guilford County to be proceeded with according to law.

The case came on to be heard at March Term, 1926, of Guilford County Superior Court before Bryson, Judge, and a jury, upon the issues raised by the pleadings.

The following issue was submitted to the jury: "Is the plaintiff estopped from prosecuting the present action to restrain and enjoin proceedings under the execution issued upon the judgment rendered by said court in the case of P. M. King, as administrator of Maggie Barber, the above named defendant, against the North Carolina Railroad Company, above named plaintiff, by the order and judgment of said court made in said case at March Term, 1923, directing that the execution of said judgment do proceed?"

The court charged the jury as follows: "That upon all the evidence, if believed by you, it becomes your duty, under the instruction of the court, to determine and declare by your verdict or answer to the issue that the plaintiff is not estopped and to answer the issue 'No.'" The jury answered the issue "No," and judgment was entered accordingly. The defendants excepted and appealed to this Court, assigning for error his Honor's said instruction.

Manly, Hendren & Womble for plaintiff.
R. C. Strudwick for defendants.

CLARKSON, J. It may appear to be a hardship that P. M. King, administrator of Maggie Barber, cannot enforce the collection by execution and levy the judgment obtained against the North Carolina Railroad Company. We must consider the setting: The United States Government put forth every effort to aid her allies and to help win the World War; to meet certain situations that arose during this period Congress passed what is known as the Transportation Act of 1920.

Sec. 206(g) is as follows: "No execution of process, other than on a judgment recovered by the United States against a carrier, *shall be levied upon the property* of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control." The war emergency forced Congress to take the railroads from their owners and they were operated under Federal control. Under the act, the roads were taken over under the proclamation of the President. Sec. 206(g), *supra,* forbids execution to be levied on any carrier's property when the cause of action arose under Federal control.

King, the administrator, has, by pleading and otherwise, consistently taken the position that this matter is *res adjudicata;* that the doctrine of estoppel is applicable, and that *"execution of said judgment do proceed";* order of Stack, J., at March Term, 1923, from which an appeal was taken but not perfected, is a finality. We cannot now so hold. Under the decision in *North Carolina Railroad Co. v. Story,* 288 U. S., Supreme Court Rep., p. 287, upon writ of *certiorari* reversing this Court (187 N. C., 184) it is said at p. 293: "Coming now to the merits, it may be conceded that the first judgment against the company in favor of the administrator, however erroneous it was in view of the cases of *Missouri P. R. Co. v. Ault,* 256 U. S., 554, 65 L. Ed., 1087, 41 Sup. Ct. Rep., 593, and *North Carolina R. Co. v. Lee,* 260 U. S., 16, 67 L. Ed., 104, 43 Sup. Ct. Rep., 2, not having been appealed from, was *res judicata.* Nor could sec. 206(g) prevent the second judgment. It was not directed against judgments. It was intended to protect the property of the company, not by preventing a judgment, but by preventing an execution to satisfy a judgment for injury by government operation of its road, whether that judgment was rendered against the carrier which leased the road, against the carrier which owned the road, or against the government itself. . . . By virtue of a law of Congress plainly within its power, a distinction was thus made between the judgment and the execution. The State Supreme Court decided that the right to a judgment as between the plaintiff and the railroad company in the second case was established by the first judgment, not that a right to execution thereon was established. 184 N. C., 442, 115 S. E., 172. . . . It is well settled that the principle of *res judicata* is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance, or only to be inferred by arguing from the degree (citing cases). . . . The reasoning and opinion of the court are not *res judicata* unless the subject-matter in issue be definitely disposed of by the decree," citing cases.

King, administrator, had a remedy under section 206(a), of the Transportation Act of 1920, which reads as follows: "Actions at law, suits in equity, and proceeding in admiralty, based on causes of action arising out of the possession, use of operation by the President of the railroad system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of 29 August, 1916), of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this act."

A careful analysis of the controversy will disclose that the gist of the contentions in the end is simple. The plaintiff contends that the question here could not be an issuable matter in the action for actionable negligence for King's intestate's death; that the question of *execution and levy* under the Federal Act did not arise until there was an actual *levy* upon the property; this may never happen, therefore, there could be no *res judicata* or estoppel. The Stack, J., order "*that execution of said judgment do proceed*" was *pro forma* under C. S., 659; that plaintiff had no equity on which to base an application for relief to restrain defendants until an actual *execution and levy.* This question could not be in issue in the actionable negligence case during that controversy—it was not born and had no life, therefore there could be no estoppel *res judicata*—its birthday was the *execution and levy.*

We have studied with care the decisions cited by defendants, but we think the United States Supreme Court reversing this Court settled every contention against defendants. As said in the brief of plaintiff: "Unquestionably the Supreme Court of the United States took cognizance of the case, exercised its power and jurisdiction, and has adjudged the rights of the parties." We can find

No error.

GREEN RIVER MANUFACTURING COMPANY v. F. D. BELL.

(Filed 16 March, 1927.)

1. **Corporations—Deeds and Conveyances—Officers—Self-Interest—Directors—Resolutions—Meetings.**

Where the president and secretary of a corporation control a majority of its stock, and with three others constitute the board of directors, a deed executed in proper corporate form by them to the secretary, for an adequate consideration, in good faith and in the absence of fraud, under a full discretionary power given to the president by the directors by resolution properly passed, is not absolutely void under the principle that an officer of a corporation may not deal with it in his official capacity for his own gain or profit.

2. **Same—Ratification.**

And where authority for such transaction has not been given by the corporation, it is only voidable at the election of the company, and may be afterwards ratified by proper corporate action.

3. **Corporations—Directors—Records—Resolutions—Parol Evidence.**

Where authorization for the sale and conveyance of corporate lands has not been fully recorded in the record of its stockholders meeting, the omitted parts may be shown by parol evidence.

4. **Corporations—Deeds and Conveyances—Officers—Self-Interest—Good Faith—Fraud—Burden of Proof—Evidence—Questions for Jury.**

The presumption is against the validity of a deed to corporate lands made by the president of a corporation to its secretary, with the burden on the grantee to show that the purchase was fair, open and free from imposition, undue advantage or actual or constructive fraud, the question being for the jury to determine.

5. **Same—"Good Faith"—Evidence.**

Evidence that the directors of a corporation were individually consulted as to the conveyance of the corporate lands by the president and secretary to the latter, is *held* competent, under the facts of this case, only upon the question of "good faith" in the transaction.

CIVIL ACTION before *Perry, Emergency Judge,* HENDERSON Superior Court.

The plaintiff is a corporation and was the owner of certain lands in said county.

The plaintiff conveyed to the defendant, F. D. Bell, as follows, to wit:

(a) 28 August, 1922, deed for certain land and water rights.

(b) 20 February, 1924, deed for 35 1/5 acres of land.

(c) 15 September, 1923, lease for 1 2/3 acres of land for a period of five years.

(d) 10 June, 1924, option for one acre of land.

All of the foregoing deeds were signed as follows: "Green River Manufacturing Co. By J. O. Bell, Vice-President. Attest: F. D. Bell, Secretary."

At the time said conveyances were made J. O. Bell was vice-president and treasurer of plaintiff company, and the grantee in said deeds, to wit, the defendant, F. D. Bell, was the secretary of said company. On 4 September, 1920, at a meeting of the stockholders of plaintiff company a resolution was adopted containing this language:

"On motion, made, seconded and carried, J. O. Bell was authorized, directed and empowered to use his own judgment and discretion in the sale of lots and sites, options and leases, and when satisfied that the company's interest would be served, to sell and make full warranty deeds, to rent lands, and houses, to lease, option, contract, and to give such water rights, easements and privileges as he thought wise and best, and would serve the mutual interest of all concerned.

Mr. Tanner made the suggestion that as Mr. Bell was on the grounds, naturally he would be more conversant with the situation, the needs and requirements and better qualified to decide and take action than any one else as the occasion arose on all such matters."

On the same date the directors of plaintiff company passed a resolution containing the following clause: "On motion duly made, seconded and carried, the treasurer was instructed, authorized and empowered and directed, using his own best judgment and discretion to make such sale of lots, sites and camp sites, giving warranty deeds, making such prices, terms and contracts to rent lands, and houses, to lease and make such options, and contracts, to give such water rights, easements and privileges and inducements as would best serve the combined interest of all concerned. That being on the grounds and thoroughly familiar with conditions, he was in better position to set prices and make terms to suit each individual case than any one else."

At the time said resolutions were adopted J. O. Bell owned a majority of the stock of the corporation, and the resolutions would not have been passed except for the vote of J. O. Bell and his son, F. D. Bell. The corporation had five directors and three constituted a quorum. J. O. Bell sold his stock in the corporation in July, 1924, to Mr. Vann Ness for thirty cents on the dollar. J. O. Bell testified that a resolution had been passed in 1922, ratifying and authorizing the sale of the property in controversy to certain persons, but that this resolution had been lost. The witness was shown a resolution dated 16 September, 1922, which was not offered in evidence, and the witness Bell testified that this resolution was not complete—that it was "just a sketch of the minutes." During the examination of the witness Bell the court intimated to counsel that in the opinion of the court "it was a question of law as to whether or not the plaintiff was entitled to elect to avoid the transactions represented by the deeds referred to in the pleadings and the evidence irrespective as to whether the property brought a fair price, and the transactions were made openly and in good faith. Thereupon, the case was withdrawn from the jury and the following judgment entered:

"This cause coming on to be heard before his Honor, B. H. Perry, judge presiding, and a jury, at this term and pending trial, and after the cross-examination of J. O. Bell, and during the redirect examination of that witness, his Honor stated to counsel for plaintiff and defendant that he desired argument on the question as to the right of the plaintiff to avoid the six instruments offered in evidence regardless of the questions of good faith of all parties connected with the transactions and of adequate considerations paid by defendant to plaintiff for the lands and rights conveyed by said instruments, and after arguments of counsel, the court being of the opinion that upon the resolutions of the stockholders and directors offered in evidence and upon the records of the corporation, and the admissions of the defendant that J. O. Bell was vice-president and treasurer and a director of the Green River Manufacturing Company, and that at the time said resolutions were passed and the directors elected that J. O. Bell and his immediate family owned more than one-half of the outstanding capital stock of said corporation, and it further appearing that Frank D. Bell, the defendant, was a director of the Green River Manufacturing Company and the secretary of the corporation, and that the said Frank D. Bell is a son of J. O. Bell, and that J. O. Bell was the active manager of the plaintiff and the only resident director of the plaintiff with the exception of the defendant, and that the four deeds and two options offered in evidence were executed by the plaintiff pursuant to the resolutions above stated so signed by J. O. Bell as vice-president and attested by Frank D. Bell as secretary.

Upon the foregoing facts the court holds that the plaintiff is entitled to have the six instruments mentioned and described in the complaint and offered in evidence as Exhibits 1, 2, 3, 4, 5, and 6 set aside, the same being voidable at the option of the plaintiff, even though the same were executed in good faith, openly and for a full, fair and adequate consideration:

It is, therefore, adjudged and decreed by the court of its own motion that the plaintiff, Green River Manufacturing Company, is entitled to have the four deeds and the two leases or options, referred to in the complaint, surrendered up for cancellation upon paying to the defendant the purchase price heretofore tendered said defendant by the plaintiff before the institution of this action, and it is accordingly decreed that the said defendant surrender up to the court for cancellation the four said deeds and two leases or options specifically referred to in the complaint, and that the same be accordingly canceled pursuant to the foregoing decree, and that at the same time the plaintiff pay into court for the use of the defendant the said sum of $4,300, with interest thereon from the date or dates when the same was paid by the defendant to the plaintiff, heretofore tendered said defendant as a part of the purchase price for said land, together with the defendant's promissory notes, representing the balance of said purchase price of said lands.

It is further adjudged that the issues as to the rental value of said lands and the issue as to betterments, if any, to which the defendant may as a matter of law and fact be declared to be entitled to, be reserved for further determination before a jury of said county and that in the meantime this cause be held and remain on the civil issue docket for that purpose."

From the foregoing judgment the defendant appealed.

Ewbank, Whitmire & Weeks and Cansler & Cansler for plaintiff.
Shipman & Justice and Mark W. Brown for defendant.

BROGDEN, J. The question of law is this: Are the deeds, lease and option executed to the defendant void or voidable at the election of the company without reference to the adequacy of the consideration or the absence of fraud?

The plaintiff contends that the conveyances referred to, the lease and the option are void by reason of the fact that the deeds were executed in the name of the plaintiff by J. O. Bell, vice-president of the plaintiff company, to F. D. Bell, secretary of plaintiff company, and that by virtue of this fiduciary relationship the attempted conveyances are void.

The effect of conveyances or leases made by a corporation to one of its officers or directors is thus expressed in *Hospital Co. v. Nicholson,* 189 N. C., p. 44: "When an officer or director of a corporation purchases or leases its property, the transaction is voidable, not void, and will be sustained only when openly and fairly made for an adequate consideration. The presumption is against the validity of such contract, and when it is attacked the purchaser or lessee must show that it is fair and free from oppression, imposition and actual or constructive fraud. Firmly established in our jurisprudence is the doctrine that a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts; and as a general rule he will not be permitted to make a profit by purchasing or leasing the property of those toward whom he occupies a fiduciary relation without affirmatively showing full disclosure and fair dealing. Upon this principle it is held that a director who exercises a controlling influence over codirectors cannot defend a purchase by him of corporate property on the grounds that his action was approved by them." *McIver v. Hardware Co.,* 144 N. C., 478; *Crockett v. Bray,* 151 N. C., 615; *Pender v. Speight,* 159 N. C., 612; *Wall v. Rothrock,* 171 N. C., 388; *Caldwell v. Robinson,* 179 N. C., 518.

The controlling principles of law with respect to validity of deeds made by a corporation to its officers or directors may be summarized as follows:

1. The conveyance of the property must be authorized by the corporation or ratified by it.

2. The law presumes that such conveyances are invalid and imposes upon the purchaser the burden of establishing that the purchase is fair, open and free from imposition, undue advantage, actual or constructive fraud.

3. Such conveyances will not be declared void as a matter of law, but it is a question for the jury to determine upon all the evidence as to whether the vitiating elements enter into the particular transaction.

In this case it appears that a resolution was adopted prior to the execution of said conveyances, authorizing the vice-president to make a sale of the land in accordance with his best judgment. "The courts of this country have generally adopted the common-law principle that if an act is to be done by an incorporated body, the law, resolution, or ordinance authorizing it to be done is valid if passed by a majority of those present at a regular meeting." *Cotton Mills v. Comrs.,* 108 N. C., 678; *Everett v. Staton,* 192 N. C., 216; *Respess v. Spinning Co.,* 191 N. C., 809.

The record in this case discloses that the resolution authorizing the sales was adopted by a majority of those present at a legal meeting. There was evidence tending to show that a resolution had been adopted in 1922 ratifying the sales, and that this resolution had been lost. Thereupon the witness was shown a resolution purporting to be adopted on 16 September, 1922, which was not offered in evidence. Referring to this resolution the witness testified that no reference was made to the price at which the lots were sold or to the prospective purchaser, but that the resolution was not complete because it was "just a sketch of the minutes." Thereupon the witness was permitted to testify as to conversations with the other officers who approved the sales, though not in a corporate meeting. This evidence was admitted for the purpose of showing good faith only. At this point the trial judge intimated, "it was a question of law as to whether or not the plaintiff was entitled to elect to void the transactions represented by the deeds referred to in the pleadings and evidence, irrespective as to whether the property brought a fair price and the transactions were made open and in good faith." Thereupon the court held that as a matter of law plaintiff was entitled to judgment.

In this ruling of the court there was error, which must necessitate a new trial.

If the corporate minutes referred to did not show all the transactions that took place at the corporate meeting, or if they were not complete in this particular, as testified to by the witness, then the omission could be supplied by parol testimony. This principle of law was thus declared in *Motor Co. v. Scotton,* 190 N. C., 194: "The general rule is that the recorded minutes of a corporation are presumed to cover the entire subject-matter or transaction and constitute the best evidence. But if the entire transaction is not recorded or the record is incomplete and fragmentary the presumption is not conclusive and parol evidence may be introduced to show what in fact was done. The incomplete records of private corporations are generally open to explanation by parol evidence." *Bailey v. Hassell,* 184 N. C., 458; *Everett v. Staton,* 192 N. C., 216.

Under the principles of law pertinent to such transactions it was a question for the jury as to whether or not the conveyances were properly authorized by the corporation and made in good faith for a fair consideration and free from the taint of imposition, undue advantage or fraud.

Reversed.

WILEY BRYANT ET AL. v. WASH BRYANT.

(Filed 16 March, 1927.)

1. **Estates—Entireties—Husband and Wife—Murder—Equity—Trusts.**

Where husband and wife hold estate by entireties, and the husband has murdered the wife, and her expectancy of life has been legally determined to have been longer than his own, equity will decree that he hold the legal title to lands held by them in entireties in trust for her heirs at law until his death, subject to his right of management and the use of the rents and profits for his own life. C. S., 2522, is not applicable.

2. Same—Injunctions.

Where a husband has murdered his wife, and is attempting to sell lands held by them in entireties and to convey the legal title under the principle of survivorship, equity will afford injunctive relief in favor of the wife's heirs at law, for whom he holds as trustee.

APPEAL by defendant from a final judgment signed by *Cranmer, J.*, in Johnston County, in an action pending in the county of HARNETT. The parties consented that the judge should find the facts upon the pleadings and the admissions of the parties and render a final judgment in the cause out of term and outside the county in which the action was pending. The facts are as follows:

1. The plaintiffs are the children of the defendant, Wash Bryant, and his late wife, Ida Bryant, who died on 12 January, 1920.

2. On 14 February, 1913, W. W. Scott and wife conveyed to Wash Bryant and wife, Ida Bryant, one hundred and thirteen acres of land located in Harnett County, North Carolina, by deed which has been duly registered in Book 177, page 506, which deed and the said record thereof are made a part of this finding of fact for full description of the land so conveyed and under said deed. The land was held by said husband and wife as tenants by entireties up to the date of the death of said Ida Bryant.

3. Said Ida Bryant was feloniously murdered and slain on 12 January, 1920, by her husband, Wash Bryant, defendant herein.

4. Said Wash Bryant was convicted of the murder of his wife at the September Term, 1923, of Harnett Superior Court, being convicted of murder in the second degree, and is now serving a term in the State prison on account of same.

5. At the time of the death of said Ida Bryant she was in good health, was younger than her husband, was free from dissipation, while her husband was addicted to the use of strong drink, and under the mortuary table she had a longer expectancy of life than her husband.

6. The defendant, Wash Bryant, at the institution of this action and the granting of the temporary restraining order herein had employed an auction company and was offering said tract of land for sale, claiming to be seized thereof in fee simple.

Upon these facts it was adjudged that the defendant holds the legal title to the land conveyed to him and his wife in trust for the benefit of the plaintiffs, his heirs at law, and that they are the equitable owners and entitled to the actual possession thereof freed and discharged from the claims of the defendant; that the defendant convey the land to the plaintiffs, and upon failure to do so that the judgment should be registered in the office of the register of deeds of Harnett County, and should operate as such conveyance; and that the defendant account to the plaintiffs for the rents and profits received by him. The cause was retained for a statement of the account. The defendant, assigning error, excepted and appealed. Modified and affirmed.

Clawson L. Williams, Clifford & Townsend, and Young & Young for plaintiffs.

H. L. Godwin for defendant.

ADAMS, J. The deed executed by W. W. Scott and his wife on 14 February, 1913, conveyed to the defendant and his wife an estate by entireties. When the defendant put his wife to death, to what extent did his felonious act affect his interest in the land? This is the question proposed for solution.

A review of the cases involving the legal effect of felonious homicide upon the title claimed by the slayer to the property of the deceased discloses three lines of argument: (1) The legal title does not pass to the murderer as heir or devisee; (2) the legal title passes to the murderer and may be retained by him in spite of his crime; (3) the legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the heirs of the deceased, exclusive of the murderer. Ames, Lectures on Legal History, 311.

The first of these positions was maintained in *Riggs v. Palmer,* 115 N. Y., 506, and in *Shellenberger v. Ransom,* 31 Nebraska, 61. In the *Riggs case* the facts were that Francis B. Palmer made his will in which he gave small legacies to his two daughters, the plaintiffs in the action, and the remainder to his grandson, the defendant, subject to the support of his mother, with a gift over to the two daughters, subject to the support of the mother, in case the grandson should die under age, unmarried, and without issue. The grandson, sixteen years of age, lived with the testator as a member of his family, and to prevent a revocation of the will took the life of the testator by means of poison. The Court held that the legal title did not pass to the defendant; that by reason of his crime he was deprived of any interest in the devise, and that he should be enjoined from using any part of the estate left him by the testator. The holding that no legal title passed and that the defendant had no interest in the devise was criticised; and a few years afterwards in *Ellerson v. Westcott,* 148 N. Y., 149, the Court of Appeals said that *Riggs v. Palmer* must not be interpreted as holding that the will was revoked; that instead of being revoked and made inoperative by reason of the crime the devise took effect and transferred the legal title, the relief to which the plaintiffs were entitled being equitable and injunctive. In the exercise of its equitable jurisdiction the court declared that the devisee should not retain and enjoy his ill-acquired title.

In *Shellenberger v. Ransom, supra,* the question was whether Leander Shellenberger, who wilfully took the life of his daughter for the purpose of getting her property, acquired title to her estate, the facts being that she died intestate and that except for his crime he would have taken her estate by inheritance. The Court, following *Riggs v. Palmer, supra,* said that Leander Shellenberger took no estate from his daughter and that her title passed to her brother. Upon a rehearing this decision was reversed, and it was held that the title to the daughter's estate vested in the criminal by operation of law and was dependent upon no condition, not even his acceptance. *Shellenberger v. Ransom,* 41 Neb., 631. Referring to these two cases it has been said: "Unfortunately the second opinion was more unsatisfactory than the first. For, although both disregarded legal principles, the first was against, while the second was in favor of the murderer." Ames, *supra,* 312, note.

Among the cases which sustain the position that the legal title vests in the murderer and may be retained by him despite his crime, are *Shellenberger v. Ransom, supra,* decided on the rehearing; *Deem v. Milliken,* 6 Ohio, C. C., 357; and *In re Carpenter's Estate,* 170 Pa., 203, 32 At., 637. In the case last cited it was shown that James Carpenter was murdered by his son so that the son might get immediate possession of the father's estate under the statute of distributions. After the commission of the crime the son and the widow, who had become an accessory after the fact, conveyed their interest in the property to the attorney who defended them in the prosecution for murder. The collateral heirs of the decedent contended that neither the mother nor the son under these circumstances had a beneficial interest in the estate.

The Supreme Court, disallowing the claim of the collateral heirs, arrived at its conclusion upon the following reasoning: "The Legislature has never imposed any penalty of corruption of blood or forfeiture of estate for the crime of murder, and therefore no such penalty has any legal existence. In the case now under consideration it is asked by the appellant that this Court shall decree that in case of the murder of a father by his son the inheritable quality of the son's blood shall be taken from him, and that his estate, under the statute of distributions, shall be forfeited to others. We are unwilling to make any such decree, for the plain reason that we have no lawful power so to do. The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. . . . It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that upon the death of a person his estate shall vest in his children, in the absence of a will, how can any doctrine, or principle, or other thing, called 'public policy,' take away the estate of a child, and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory; and the estate cannot be diverted from those persons, and given to other persons, without violating the statute. There can be no public policy which contravenes the positive language of a statute."

In the opinion the Court cites *Owens v. Owens,* 100 N. C., 242, to which we shall hereafter refer, *Shellenberger v. Ransom, supra, Riggs v. Palmer, supra,* and noting a distinction between descent and a devise, which involves the operation of a private grant, differentiates *Insurance Co. v. Armstrong,* 117 U. S., 591, 29 Law Ed., 997, and *Cleaver v. Association,* 1 Q. B., 147, as decisions based entirely upon the ground of fraud perpetrated in breach of contract rights.

But if we concede as a matter of law that the doctrine of public policy cannot affect the imperative language of a statute which directs the course of descent, we are confronted with the question whether this or any other doctrine prevents the application of the familiar equitable principle that, when the legal title passes in case of descent or devise, the wrongdoer may be treated as a constructive trustee of the title he has unlawfully acquired. To this question, in our opinion, a negative answer must be given.

The scope of constructive trusts is thus outlined by Pomeroy: "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. They arise when the legal title to property is obtained by a person in violation, expressed or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed trusts *in invitum;* and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly 'constructive.' An exhaustive analysis would show, I think, that all instances of constructive trusts properly so called may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. . . . This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud." 3 Pomeroy's Eq. Jurisprudence, sec. 1044.

After saying that if the legal title to property has been obtained through actual fraud, undue influence, or duress, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to it, although he may never have had the legal estate, the author proceeds: "The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." *Ibid.,* sec. 1053. And with respect to a devise or bequest procured by fraud it is said: "It is astonishing that the numerous cases holding that no exception can be made to the statutes of wills or of descent for the case where the testator or ancestor is murdered by his devisee, legatee or heir, have overlooked the plain analogy to the principle of the above paragraph. Unfortunately, the opinions in most of those cases show no evidence that this analogy was considered by the court, or even brought to the court's attention. That the principle should be applied in this class of cases, and the criminal held a constructive trustee of the fruits of his crime seems too plain for argument. See *Wellner v. Eckstein,* 105 Minn., 444, 117 N. W., 830 (opinion by *Elliott, J.); Perry v. Strawbridge,* 209 Mo., 621, 123 A. S. R., 510, 14 Ann. Cas., 92, 16 L. R. A. (N. S.), 244, 108 S. W., 641. For a typical case ignoring the equitable view, see *McAllister v. Fair,* 72 Kan., 533, 115 A. S. R., 233, 7 Ann. Cas., 973, 3 L. R. A. (N. S.), 726, and note, 84 Pac., 112." *Ibid.,* sec. 1054, note b, p. 2411. Several of the "typical cases" were cited and reviewed in 34 Am. Law Register, page 636.

The equitable doctrine is this: As a question of common law the homicide does not prevent the legal title from passing to the criminal as the heir or devisee of his victim, but equity, acting *in personam,* compels the wrongdoer who has acquired the *res,* to hold it as a constructive trustee of the person wronged, or of his representatives, if he be dead; and this result follows although the homicide may not have been committed for the express purpose of acquiring title, if by reason of the homicide the title would have passed to the criminal under the common law. This, we think, is the principle which should be applied in the case before us; it not only makes unnecessary the attempted distinction between cases of devise or bequest and cases of descent; it obviates the reproach of permitting an atrocious criminal to profit by his perfidy. See 30 A. L. Review, 130; 4 Harvard L. Review, 394.

It is altogether reasonable that the appellant should rely upon the decision in *Owens v. Owens,* 100 N. C., 240, for it was cited by the Supreme Court of Pennsylvania in support of the conclusion reached in the *Carpenter case. In re Carpenter's Estate, supra.* In the *Owens case* the question was whether the criminal act of participating in the murder of her husband deprived the widow of her right to have dower allotted in the estate of which he had died seized, and it was held that it did not. It is apparent, however, that the appeal was treated as presenting nothing more than a question of law, in reference to which the Court said as the law gives dower and makes no provision for its forfeiture for crime, adultery being the only bar (The Code, sec. 1844), no obstacle stood in the way of the widow's seeking what the law had given. There is an intimation that she was entitled to share in the personal estate of her husband as a distributee; but this also was dealt with as a question of law. The Court remarked, "We have searched in vain for an authority or ruling on the question and we find no adjudged case." It does not appear what the decision would have been if the equitable jurisdiction of the court had been invoked for the administration of the doctrine to which we have adverted; for as suggested by Pomery, this is one of those cases in which the equitable principle was not brought to the attention of the Court.

If the doctrine is applicable, how does it affect the appellant's title? The answer depends upon the nature of an estate by entireties. In such case by a legal fiction the husband and wife hold the title as one person. Whenever the fictitious unity of person is severed by the death of either the survivor has the title, the deceased leaving no interest which is descendible or devisable. During its continuance neither the husband nor the wife can convey or encumber the estate so as to destroy the right of the survivor, but the husband has the control and use of the property and is entitled to the possession, income, and usufruct thereof during their joint lives. *Bruce v. Nicholson,* 109 N. C., 204; *Bank v. McEwen,* 160 N. C., 414; *Dorsey v. Kirkland,* 177 N. C., 520; *Davis v. Bass,* 188 N. C., 200. It is therefore manifest that if the deceased wife were now living the appellant could not be deprived of his interest in the estate by an arbitrary judgment of the court. None the less is he entitled to the enjoyment of such interest after her death; but for the benefit of her heirs at law a court of equity will interpose its protecting shield. This principle is illustrated by Ames, *supra,* 321: "Similar reasoning would be applicable if land bought by B. and C. had been conveyed to them as joint tenants in fee simple, and C. were then to murder B. Each joint tenant has a vested interest in a moiety of the land so long as he lives, and a contingent right to the whole upon surviving his fellow. The vested interest of C., the murderer, cannot be taken from him even by a court of equity. But C. having by his crime taken away B.'s vested interest must hold that as a constructive trustee for the heir of B."

In the application of this principle a court of equity will not deprive the appellant of his interest in the estate, but the appellant by his crime took away his wife's interest, and as to this he must be held a constructive trustee for the benefit of her heirs, the judge in effect having found as a fact that the deceased would have survived him. Even in the absence of such finding, equity would probably give the victim's representatives the benefit of the doubt. Ames, *supra,* 321.

Our conclusion is that the appellant holds the interest of his deceased wife in the property as a trustee for her heirs at law; that he should be perpetually enjoined from conveying the property in fee; that the plaintiffs should be adjudged the sole owners, upon the appellant's death, of the entire property as the heirs of their deceased mother; and that the judgment as thus modified should be affirmed.

As our decision is based upon equitable principles, it is not necessary to determine whether the provisions of C. S., 2522, in reference to the felonious slaying of the husband or wife, which was enacted after the decision in *Owens v. Owens, supra,* embraces estates held by entireties. Laws 1889, ch. 499.

Modified and affirmed.

JAMES E. HAYES, AND RUTH HAYES AND LOIS HAYES, BY THEIR NEXT FRIEND, JAMES E. HAYES, v. E. A. BENTON, J. L. HOFLER, J. C. HOLLAND, J. M. GLENN, C. D. GATLING, T. B. PARKER, D. A. WILEY, T. J. JESSUP, BOARD OF EDUCATION OF GATES COUNTY, AND THE GATES CONSOLIDATED SCHOOL.

(Filed 16 March, 1927.)

1. Education—Counties—Statutes—Limits for Transportation of School Children—Discretionary Powers.

Under the express provisions of statutes, 2 C. S., 5412, 3 C. S., 5489, the county board of education has the power, within its sound discretion, to prescribe and define the lines of demarcation within which children of the public school age may be transported by the county to a given public schoolhouse, and have it applied in general terms to all such children living beyond the lines so fixed.

2. **Mandamus—Pleadings—Demurrer.**

Mandamus is an extraordinary remedy allowed in civil matters to compel a public officer to perform some legal duty clearly required of him by law, when no other remedy is available, and the complaining party must clearly establish the violation of his right to obtain the relief sought.

CLARKSON, J., dissenting.

APPEAL by plaintiffs from *Nunn, J.,* at December Term, 1926, of GATES. Affirmed.

The substance of the material allegations in the complaint may be stated as follows: Benton, Hofler and Holland compose the board of education; Glenn is superintendent of public instruction; Jessup is principal, and Gatling, Parker and Wiley are the school committee. Ruth Hayes, 16 years of age, and Lois Hayes, 6 years of age, children of James E. Hayes, reside within the bounds of the consolidated district, are of good moral character, and are entitled to attend the consolidated school. The school comprises a large territory in the northwest section of the county, and transportation is necessary to enable many of the children to go to and from the school building. Four busses are employed, for the use of which the board of county commissioners provided funds at the request of the county board of education. Ruth and Lois Hayes began to attend the school at the fall session of 1926, and continued to attend until 8 November, when they were dismissed from school by the principal under direction of the county board for violating the transportation rules made by this board. It is alleged also:

12. That Lois Hayes is a minor, 6 years of age, and that Ruth Hayes, who is sixteen years of age, is afflicted, and has been operated on at the hospital, and because of the condition of her feet, and because of the age of Lois, they reside at a distance too far from the school to attend without being transported, and that the said board of education and committee have provided a bus which passes the home of plaintiffs, and which can take these plaintiffs to and from school, and which, until 8 November, 1926, did take them to and from school; that the said bus takes other children in said district to said school.

13. That the board of education, as plaintiffs are informed and believe, have had the said children dismissed from the said school because they rode on this bus with the other school children, and not because of any violation of the rules of the said school.

14. That the said James E. Hayes is a man of limited means; that he is a farmer; that he is not able to furnish transportation to the said Ruth and Lois Hayes, and they are prohibited from attending the said school and from deriving the benefits of an education by reason of the conduct of the board of education of Gates County, which is wrongful and unlawful, and injurious to the plaintiffs, and deprives them of their rights to attend said school and receive the benefits which they are entitled to from the said public school of Gates County, and said conduct prohibits the said James E. Hayes furnishing to his children the necessary school advantages as provided by law.

15. That the defendants gave no excuse for their wrongful conduct, except that they say that the two children specifically set out above, live within two and one-half miles of the said school building by about fifty yards.

16. That the defendants know that Ruth Hayes is afflicted, and has been from infancy, and is not able to walk to school, and that Lois Hayes is just 6 years of age, and the distance is too great for her to attend school without transportation; that the said James E. Hayes does not ask the privilege of his other four children riding in the school bus, and they attend school regularly, and walk to and from school.

The prayer is that the defendants be compelled to permit Ruth and Lois Hayes to be conveyed in the bus to and from the school, etc.

The defendants filed an answer denying the material allegations of the complaint and setting up the plaintiffs' alleged failure to state a cause of action in that it appears from the complaint that there is no allegation of bad faith on the part of the defendants or any plain duty imposed upon them for which mandamus would lie in the event of their refusal; but that it does appear that the defendants acted within a reasonable and legal discretion vested in them under the law. There was a judgment dismissing the action, to which the plaintiffs excepted and from which they appealed.

A. P. Godwin and Aydlett & Simpson for plaintiffs.
Ehringhaus & Hall for defendants.

ADAMS, J. The General Assembly has provided that the county board of education upon consolidating two or more school districts into one shall be authorized and empowered to make provision for the transportation of pupils in the consolidated district who reside too far from the schoolhouse to attend without transportation; also that the expense of transportation, when included in the budget and duly approved, shall be paid out of funds provided by the board of county commissioners.

3 C. S., 5489. Pursuant to these provisions the board of education in Gates County provided for the transportation of pupils within the boundaries of the consolidated district who reside more than two miles and a half from the school building. The plaintiffs allege that they live not quite this distance from the schoolhouse, but that Ruth and Lois Hayes, despite this fact, have the legal right to be conveyed in the bus to and from the school, and that they are entitled to a writ of mandamus to compel the enforcement of their alleged right.

Mandamus is an action or proceeding of a civil nature extraordinary in the sense that it can be maintained only when there is no other adequate remedy and designed to enforce clear legal rights or the performance of ministerial duties which are enjoined by law; but the writ will not be issued to enforce an alleged right which is in doubt. Not only must the plaintiff show that he has a clear legal right; he must show that the opposing party is under legal obligation to perform the act or to grant the relief for the performance or enforcement of which the action is prosecuted. 38 C. J., 541; *Johnston v. Board of Elections,* 172 N. C., 162; *Britt v. Board of Canvassers, ibid.,* 797; *Person v. Watts,* 184 N. C., 499, 505; *Person v. Doughton,* 186 N. C., 723; *Umstead v. Board of Elections,* 192 N. C., 139; *Lewis, Treasurer, v. Comrs., ibid.,* 456.

It is important to note that the action was not brought to compel the defendants to exercise their jurisdiction or discretion, or to perform a duty which is merely ministerial; it was instituted for the purpose of compelling the defendants to abrogate or to disregard a rule which the board of education had established by express authority of law. 2 C. S., 5412, School Code, secs. 29, 30; 3 C. S., 5489; School Code, sec. 81. It is, therefore, evident that the plaintiffs' allegations, if admitted, are not sufficient to establish a clear legal right to have the writ issued. The Legislature, in authorizing the county board of education to provide for the transportation of pupils, gave it power in the exercise of its sound discretion to fix and designate the geographic line between those who do and those who do not reside too far from the schoolhouse to attend without transportation. The line thus established is the final determination of the boundary beyond which the use of the bus is necessary; and in the absence of abuse the discretion exercised by the board in fixing the dividing line cannot be set aside or controlled by the courts. In *Newton v. School Committee,* 158 N. C., 187, it is said: "In numerous and repeated decisions the principle has been announced and sustained that courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Jeffress v. Greenville,* 154 N. C., 499; *Board of Education v. Board of Commissioners,* 150 N. C., 116; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Ward v. Comrs.,* 146 N. C., 534; *Small v. Edenton,* 146 N. C., 527; *Tate v. Greensboro,* 114 N. C., 392; *Brodnax v. Groom,* 64 N. C., 244."

It is necessary to bear in mind the reason assigned for dismissing the children from school—their persistent violation of the rule made by the board for the transportation of pupils. They were denied transportation only because they resided within two and one-half miles from the schoolhouse. The principal of the school said that he regretted the necessity, but was compelled to dismiss them for this cause. They did not base their alleged right to transportation on the ground that Ruth Hayes is afflicted; they insisted upon the unconditional transportation of both children. There is no evidence that they have ever requested the board of education to modify the rule by providing for the transportation of afflicted pupils who reside within the prescribed boundary. In the complaint there is an intimation that the principal and the school committee favor the change, "provided such affliction renders said child unable to walk the distance and is so adjudged by a competent physician"; but it is not alleged that a certificate has been secured, possibly because, as suggested in the argument, Ruth Hayes has heretofore "demonstrated her ability to walk to school." The plaintiffs do not contend that the action of the defendants was corrupt or arbitrary. In its ultimate analysis their appeal presents one question: Shall pupils within the prescribed boundary make use of the bus to the exclusion of those who, under the rule made by the county board of education, admittedly reside too far from the schoolhouse to attend unless transported? To this question there can be only one answer. The writ of mandamus must be denied because the plaintiffs have failed to show a clear legal right to the relief demanded, in that the rule made by the county board of education was authorized by law and the discretion of the board in determining the line of separation is not subject to the control of the courts. The judgment is

Affirmed.

CLARKSON, J., dissenting: This is a demurrer and the facts are taken to be true. Under 3 C. S., 5489, provision for the transportation of pupils was made in this consolidated district. On account of the expense, the limit was fixed so that only children outside of two and a half miles from the school could be transported in the four busses. Plaintiff's two children—one 6 years of age and the other 16—lived with their father about fifty yards just inside the two and a half mile radius and the bus passed the home of these children each day on the way to and from school. When school opened in the fall of 1926 these children were taken in the bus to school without objection. On 8 November, 1926, they were dismissed from school without any reason whatsoever, but solely because they had been riding in the bus to school, which was claimed to be against the rules. The principal of the school and the school committee of the district are willing that the two children shall attend school and have so expressed themselves, but the fiat of the board of education is to the contrary. This action of mandamus was brought to compel defendants to permit these children to attend school and to transport them to and from school in the bus which is provided and passes their home.

So far as the little 6-year-old girl, Lois, is concerned, I think that she would have no right to go in the bus, as the compulsory attendance law is between the ages of 7 and 14. 3 C. S., 5757. She would be on a footing with all other children in the district.

The record shows on the demurrer that Ruth is 16 years of age. She is afflicted, and has been operated on in a hospital, and because of the condition of her feet she is unable to walk to school and cannot attend without being transported. She is a cripple, and has been afflicted since infancy.

Law has many definitions. Blackstone says: "Law is a rule of civil conduct prescribed by the supreme power." "Law," according to an ancient maxim, "is good sense, and what is contrary to good sense is not good law." "Law is the enforcement of justice among men." "Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action."

There is nothing in the record to show that there was no room in the bus; in fact, Ruth had been, up to 8 November, 1926, taken to school in the bus. We have this picture: A little cripple child sitting by the roadside appealing to be taken with her more fortunate companions, who are not afflicted, to school. With room in the bus, defendants, board of education, command that it shall pass her by. Of all entitled to the benefits of the school, it should be this cripple. We can find nothing in the school law that gives any right to defendants to refuse a cripple, where there is room in the bus, to be taken to and from school. The bad example to the other children, as they see this cripple passed by, with room in the bus, is contrary to all sense of humanity and justice. I think she has a clear right. We hear now as of old the cry that drove Her to the manger "because there was no room for them in the inn."

It is admitted in the case that the father of the little cripple girl is unable to furnish transportation, and there is no other public school in the county to send her to. The father is a farmer of limited means, with a wife and nine children to support, and desires to educate his children. This little cripple, "whom the finger of God has touched," is unable to enjoy the sports and play of other children, but she can be educated, and the light of knowledge will help her bear the burden of affliction. But, with room in the bus, defendants pass her by and plead discretion. The humiliation—this cripple, naturally sensitive, being dismissed from school solely because she could not walk but rode in the bus. The principal of the school and the local school committee are willing, but the central body, the board of education, commands dismissal of the cripple.

"Law is considered the perfection of reason and founded on justice and common sense." In this case there is no reason, justice or common sense in the conduct of the defendants, board of education, in regard to this cripple.

DAVID M. RAYNOR ET UX. v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 16 March, 1927.)

Appeal and Error—Division as to Opinion—Judgments.

Where the Justices of the Supreme Court are equally divided in their opinions on appeal, the judgment of the Superior Court will be affirmed.

CONNOR, J., not sitting.

APPEAL by defendant from *Devin, J.*, at September Term, 1926, of SAMPSON.

Civil action to recover disability benefits under a policy of insurance issued by the defendant to plaintiffs.

From a verdict and judgment in favor of the feme plaintiff, the defendant appeals, assigning errors.

H. E. Faison, R. D. Johnson and Faircloth & Fisher for plaintiffs.

Butler & Herring and Brooks, Parker, Smith & Hayes for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Connor, J.*, not sitting, the judgment of the lower court is affirmed and stands, according to the uniform practice of appellate courts, as the decision in this case, but without becoming a precedent. *Jenkins v. Lumber Co.*, 187 N. C., 864.

No error.

J. M. WILSON ET AL. v. BOARD OF COMMISSIONERS OF GUILFORD COUNTY ET AL.

(Filed 16 March, 1927.)

Appeal and Error—Statutes—Repealing Statutes—Constitutional Law.

The later repeal of a statute attacked for its alleged unconstitutionality renders unnecessary the decision of the Supreme Court on the facts of this case.

CIVIL ACTION, before *Lyon, J.*, at March Term, 1926, of GUILFORD. This action was instituted to test the constitutionality of chapter 559, Public-Local Laws of 1925. From judgment, declaring the act unconstitutional, the defendants appeal.

King, Sapp & King for plaintiffs.
James J. Hoge and E. S. Parker, Jr., for defendants.

PER CURIAM. Since this case was argued in this Court, chapter 559, Public-Local Laws of 1925, was repealed by House Bill 53, Senate Bill 114, duly enacted by the General Assembly of 1927. The question therefore presented by the record is now merely academic and the decision thereof by this Court would be a useless performance, and the appeal is

Dismissed.

DARDEN v. BAKER ET AL.

(Filed 23 March, 1927.)

1. **Bills and Notes—Negotiable Instruments—Payment—Endorsement—Holder in Due Course—Actions—Parties—Pleadings—Demurrer.**

Where there are allegations and evidence that an attorney at law lends his money and secures the note given therefor by a mortgage on the maker's lands, and after maturity the plaintiff becomes the holder in due course for value by endorsement from the original payee, and the maker has paid the note to the original payee and the papers have been canceled of record, and after personal notice, the plaintiff has collected certain payments from the payee of the note and credited them upon his other obligations to the plaintiff: *Held*, sufficient to raise the issue of election by the plaintiff to proceed against the original payee of the note, or the maker of the note and mortgage.

2. **Instructions—Determinative Principles of Law—Requests for Special Instructions—Appeal and Error—Statutes.**

Where from the pleadings and evidence an issue is raised for the jury to determine whether the holder for value of a mortgage note has elected to sue the original payee instead of the maker and mortgagee, under the provisions of our statute, C. S., 564, it is required of the trial judge that he charge the jury upon the phase of the case, material to the determination of the controversy, upon the principles of law thereto applying, without the necessity of a prayer for special instruction covering them.

CIVIL ACTION, before *Matthews, Emergency Judge,* at December Term, 1926, of LENOIR.

The evidence tended to show that on 27 January, 1919, John D. Baker and wife executed and delivered their promissory negotiable note to G. G. Moore, an attorney of Kinston, N. C., for the sum of $1,000, said note being due and payable on 31 December, 1919. The defendant, in order to secure the payment of said note, executed a deed of trust upon property owned by the defendant to J. F. Liles, trustee, which said deed of trust was duly recorded in Book 57, page 614, in the office of the register of deeds of Lenoir County. After said note had matured, to wit, on 7 February, 1920, the plaintiff purchased said note from G. G. Moore, the payee therein, and the said payee duly endorsed the note to the plaintiff. The defendant contended that on 23 February, 1920, he paid G. G. Moore, attorney, the full amount of said note, and that Moore went to the office of the register of deeds of Lenoir County and made the following entry upon said deed of trust: "Satisfied 23 February, 1920. G. G. Moore. Witness: C. W. Pridgen, Register of Deeds." The defendant contends that two years after the note had been paid and the purported cancellation entered upon the record, the plaintiff made demand upon the defendant for the payment of said note. The defendant thereupon told plaintiff's agent that he had paid the note to Mr. Moore and went with plaintiff's agent to see Moore. Moore thereupon informed them that the defendant did not owe anything on the papers. Thereupon the plaintiff employed an attorney to collect the amount of the note from Moore. Moore made certain payments, which were credited by the plaintiff upon some unsecured claims, and afterwards left the country. The defendant contended that he heard no more about the matter until the suit was brought on 3 July, 1925.

There was evidence that $160.00 had been paid on said paper prior to the time plaintiff had acquired title thereto, and this was admitted by the plaintiff as a credit upon said paper, leaving a balance due of $900.

The issues and the answers of the jury thereto were as follows:

1. Is the plaintiff the owner and holder of the note sued on in due course? A. Yes.

2. What amount, if anything, is the defendant indebted to plaintiff on said note? A. $900 with interest.

3. Was G. G. Moore the agent of the plaintiff in the collection of said note and in the cancellation of said deed of trust? A. No.

Upon the verdict there was judgment for plaintiff, in which said judgment a commissioner was appointed to sell the defendant's land and apply the proceeds of the sale to the payment of said note.

From the judgment so rendered the defendants appeal.

Rouse & Rouse for plaintiff.
Sutton & Greene for defendants.

Brogden, J. The defendants allege, "that upon being informed of the payment of said note as aforesaid to the said G. G. Moore, the payee thereof and attorney of plaintiff, it was the duty of the plaintiff, if she was the owner and holder of said note and had given the said Moore no authority to collect the same for her, which is denied, to elect whether she would look to the said Moore for the payment of said note, or would continue to assert her said alleged claim against these defendants." The defendants further allege that the plaintiff, after notice of the collection of said note by said Moore, accepted payments from him on said indebtedness, and that such conduct was a ratification of any unauthorized act of Moore in collecting said note.

There was ample evidence to support the allegations of defendants. Plaintiff was asked this question: "The whole truth is, you were looking to Guy Moore for your money?" (A.) "Yes, sir. I knew he had collected it after it was too late. Before then I employed Mr. Denton to collect this money from him. I did not at any time ever demand payment of John Baker or his wife on this paper until this year. I bought them in 1920, and I reckon about the middle of last year when I brought suit was the first time I demanded it. I did not tell Mr. Moore to loan this $1,000. It was my money to start with." Plaintiff also testified: "I stated to Mr. John Denton that Mr. Guy Moore had *collected this money for me, but did not turn it over to me.*" The plaintiff testified further that she employed Mr. Denton to collect this particular money from Mr. Moore after she had notice that the defendant Baker contended that he had paid Moore the full amount of the paper, and further that Moore had made certain payments to said attorney, but that plaintiff had credited these payments on some unsecured indebtedness due her by Moore.

So that, it appears from the record that there was proper allegation as to ratification of the transaction by the plaintiff and sufficient evidence to be submitted to the jury upon that phase of the case. An examination of the charge of the court discloses that this phase of the case and the legal effect of plaintiff's conduct after notice of the unauthorized act of Moore was not submitted to the jury either by stating such contention or by positive instruction. While no issue was submitted by the defendant and no special instruction requested, still it was the duty of the judge under C. S., 564, to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

We are of the opinion that the charge of the court does not comply with the law in the particular mentioned.

In *Nichols v. Fibre Co.,* 190 N. C., 1, *Connor, J.,* said: "While counsel may argue the law of the case to the jury, both plaintiff and defendant are entitled, as a matter of right, to have the judge declare and explain the law arising on the evidence. A failure to comply with the statute must be held as error. The error was not waived in this case by failure of defendant to request special instructions." *Furst v. Merritt,* 190 N. C., 397; *S. v. Melton,* 187 N. C., 481; *Bowen v. Schnibben,* 184 N. C., 248; *Hauser v. Furniture Co.,* 174 N. C., 463; *Worthington v. Jolly,* 174 N. C., 266.

Upon the whole record, therefore, we hold that a new trial should be awarded.

New trial.

C. G. MORRIS, TRADING AS C. G. MORRIS AND COMPANY, v. D. W. CLEVE AND W. A. CLEVE, PARTNERS, THE BANK OF WASHINGTON, THE FEDERAL RESERVE BANK OF RICHMOND, VA., THE NATIONAL BANK OF NEW BERN, AND H. P. WHITEHURST, RECEIVER OF THE BANK OF VANCEBORO.

(Filed 23 March, 1927.)

Actions—Parties—Bills and Notes—Negotiable Instruments—Holder—Endorsements—Pleadings—Demurrer.

Only the holder in due course can maintain an action on an unpaid check given by the maker of the note, and where it affirmatively appears from the complaint in an action by the original payees who have discounted the note at the plaintiff's bank with the payee's endorsement, that the check so given remained unpaid on account of the insolvency of the bank on which it was drawn, without further allegation that plaintiff had made good the check or otherwise had suffered loss, a demurrer thereto will be sustained, the right of action being alone to the bank who had discounted the note and had received the unpaid check.

APPEAL by plaintiff from *Nunn, J.,* at December Term, 1926, of BEAUFORT. Affirmed.

Defendants, D. W. Cleve and W. A. Cleve, demurred to the complaint in this action, for that said complaint does not state facts sufficient to constitute a cause of action against them or either of them. From judgment sustaining the demurrer, plaintiff appealed to the Supreme Court.

H. C. Carter and Ward & Grimes for plaintiff.
W. C. Rodman and Guion & Guion for defendants.

CONNOR, J. The facts stated in the complaint, as a cause of action, upon which plaintiff demands judgment that he recover of defendants the sum of $2,000, are as follows:

First. Some time prior to .... day of December, 1923, defendants, D. W. Cleve and W. A. Cleve, residing at Vanceboro, in Craven County, N. C., executed their promissory note for the sum of $2,000, payable to the order of plaintiff; said note was thereafter discounted by plaintiff with the Bank of Washington, located at Washington, in Beaufort County, N. C.

Second. On .... day of December, 1923, defendants, D. W. Cleve and W. A. Cleve, makers of said note, sent to the Bank of Washington their check for the sum of $2,000, drawn on the Bank of Vanceboro, at Vanceboro, N. C., to be applied to the payment of said note; at the request of the Bank of Washington, plaintiff endorsed said check; thereupon the note was marked "Paid," and delivered to defendants, D. W. Cleve and W. A. Cleve.

Third. The Bank of Washington forwarded said check to the Federal Reserve Bank of Richmond, Va., for collection; the Federal Reserve Bank of Richmond then forwarded said check to the Bank of Vanceboro, on which it was drawn, for payment; the Bank of Vanceboro thereupon sent its check drawn on the National Bank of New Bern, N. C., to the Federal Reserve Bank of Richmond, in payment of defendant's check on said Bank of Vanceboro; the Federal Reserve Bank of Richmond then sent the check of the Bank of Vanceboro to the National Bank of New Bern for payment; the National Bank of New Bern failed and refused to pay the check drawn by the Bank of Vanceboro on said National Bank of New Bern; the failure and refusal of the National Bank of New Bern to pay said check of the Bank of Vanceboro, payable to the order of the Federal Reserve Bank of Richmond, was wrongful and unlawful.

Fourth. When defendants, D. W. Cleve and W. A. Cleve, sent their check for $2,000 to the Bank of Washington to be applied in payment of their note, payable to the order of plaintiff, and discounted by plaintiff to said Bank of Washington, the Bank of Vanceboro was in active operation; the Bank of Washington and the Federal Reserve Bank of Richmond failed to use due diligence in the collection of defendant's check for $2,000; the failure of the Bank of Washington to collect said check was due to its negligence and the negligence of the Federal Reserve Bank of Richmond, in handling said check for collection.

Fifth. The Bank of Vanceboro, during the time of these transactions, was insolvent; it has been so adjudged, and defendant, H. P. Whitehurst, has been duly appointed receiver of said Bank of Vanceboro; said receiver is now engaged in the performance of the duties of his office; the assets in his hands, available for the payment of its indebtedness, are merely nominal.

Sixth. Neither the check drawn by the Bank of Vanceboro on the National Bank of New Bern, payable to the order of the Federal Reserve Bank of Richmond; nor the check drawn by defendants, D. W. Cleve and W. A. Cleve on the Bank of Vanceboro, and sent by them to the Bank of Washington to be applied to the payment of their note; nor the note executed by said defendants, payable to the order of plaintiff, and discounted by plaintiff with the Bank of Washington, has been paid; the indebtedness of defendants, D. W. Cleve and W. A. Cleve, evidenced by said note and check, is now due and unpaid.

Plaintiff alleges that by reason of the wrongs and negligences set out in the complaint he has been damaged in the sum of $2,000; he demands judgment that he recover of defendant, D. W. Cleve and W. A. Cleve on the indebtedness represented by the note and by the check the sum of $2,000, and interest, and that he recover of the defendants, the Bank of Washington, the Federal Reserve Bank of Richmond and the National Bank of New Bern the sum of $2,000 as damages.

Upon the facts alleged in the complaint, and to be taken as true upon consideration of defendant's demurrer, the court was of the opinion that plaintiff had failed to state a cause of action against defendants, D. W. Cleve and W. A. Cleve, and therefore sustained their demurrer. In this we find no error.

Plaintiff cannot recover of the defendants, D. W. Cleve and W. A. Cleve, on the note executed by them, and payable to plaintiff, for the reason that it appears affirmatively on the face of the complaint, that plaintiff has discounted said note with the Bank of Washington; plaintiff is not now and was not at the commencement of this action the holder of said note. It is immaterial whether said note has in fact been paid or not; the Bank of Washington, as the holder of the note, if it has not been paid, can alone recover of defendants, as makers of the note, the amount due thereon.

Plaintiff cannot recover on the check drawn by defendants on the Bank of Vanceboro; this check was sent by defendants to the Bank of Washington, in payment of the note then owned by said bank; plaintiff is not now, and has never been the owner of said check; it does not appear that plaintiff has been called upon by the Bank of Washington to pay said check, because of his liability as endorser thereon. It is immaterial whether said check has in fact been paid by the Bank of Vanceboro, on which it was drawn, or not; the Bank of Washington, as holder of said check, if it has not been paid, can alone recover of defendants as drawers of the check, the amount due thereon.

No facts are alleged in the complaint which constitute negligence on the part of these defendants, nor is it alleged that plaintiff has sustained any damage by reason of any act or acts of these defendants. No actionable negligence on the part of these defendants is alleged in the complaint.

The judgment sustaining the demurrer of defendants, D. W. Cleve and W. A. Cleve, to the complaint is

Affirmed.

DR. JOHN SALIBA v. NORFOLK-SOUTHERN RAILROAD COMPANY.

(Filed 23 March, 1927.)

Principal and Agent — Railroads—Claim Agent—Physicians and Surgeons—Scope of Agent's Authority—Evidence.

A principal is not only bound by the acts of his agent within his express authority, but also within his implied authority, which latter may be evidenced by the acts of the particular agent in the same or similar circumstances. And where a physician or surgeon has previously been called in by the claim agent of a railroad company to operate or render professional services to persons injured by its train, and the company has paid the physician for them, it may not thereafter deny liability for similar services so rendered, without having given in some recognized way notice of the lack of its agent's authority.

APPEAL by defendant from *Nunn, J.*, at September Term, 1926, of PASQUOTANK. No error.

Action to recover the value of professional services rendered by plaintiff, a physician and surgeon, to one Lewis Hoffler, at the request of defendant, and upon defendant's express promise to pay for same.

Plaintiff alleges that the contract sued upon was made on behalf of defendant by a claim adjuster in its employment.

Defendant denies that its claim adjuster made the contract as alleged by plaintiff; it further denies that said claim adjuster had authority to make a contract on its behalf for the payment of professional services to be rendered by plaintiff to Lewis Hoffler.

The only issue submitted to the jury was answered as follows:

"Is the defendant indebted to plaintiff; if so, in what amount? Answer: Yes, $500 without interest."

From judgment on the verdict, defendant appealed to the Supreme Court.

Walter L. Small for plaintiff.
Thompson & Wilson for defendant.

Connor, J. In December, 1921, plaintiff, a physician and surgeon, performed an operation on one Lewis Hoffler, in a hospital at Elizabeth City, N. C., and thereafter attended him professionally until he had fully recovered, and was discharged by plaintiff. The jury has found that the value of the services rendered by plaintiff to Hoffler is $500. The jury has further found, from the evidence and under the instructions of the court, that said services were rendered by plaintiff at the request of a claim adjuster, in the employment of defendant; that said claim adjuster made said request as agent of defendant; and that as such agent the claim adjuster had authority to make said request on behalf of defendant, who thereby became liable for the value of said services. By its answer to the issue submitted, the jury has found that plaintiff is entitled to recover of defendant the sum of $500, the value of said services.

Upon its appeal to this Court defendant contends that there was error in the refusal of the trial judge to allow its motion for judgment as of nonsuit, for that there was no evidence from which the jury could find that the claim adjuster had authority, actual or apparent, to make the contract on its behalf, as alleged by plaintiff.

Plaintiff does not contend that the claim adjuster was authorized merely by his employment as such, to make the contract on behalf of defendant for professional services to be rendered to Lewis Hoffler. He contends that defendant had expressly authorized the claim adjuster to make contracts such as that upon which he seeks to hold defendant liable in this action, or that if in fact defendant had not conferred upon its claim adjuster such express authority, it had given him an apparent authority to so contract, because defendant had theretofore ratified similar contracts made by the claim adjuster with plaintiff and had paid plaintiff for services rendered to other persons, similar to those rendered to Lewis Hoffler.

The evidence tended to show that Lewis Hoffler had been found, on the night of 3 December, 1921, near the station of defendant, at Elizabeth City, N. C., suffering from a serious injury upon his head; that he had been taken by friends to the hospital, and that plaintiff had been called to see him about midnight. A day or two after Hoffler had been admitted to the hospital, the claim adjuster employed by defendant to investigate accidents out of which claims might arise against defendant for damages, called at the hospital to see Lewis Hoffler. Upon learning that Hoffler was unconscious, and in grave danger because of the injuries from which he was suffering, the claim adjuster instructed plaintiff to perform the operation which plaintiff advised was necessary for the relief of Hoffler. At this time neither the claim adjuster nor the plaintiff knew whether Hoffler was an employee of defendant or a trespasser at the time he was injured. All that either knew was that he had been injured while riding on a freight train of defendant and that he had been discovered, a short time after the train had passed, near the track in an unconscious condition, caused by a compound, compressed fracture of the frontal bone of his head. Upon several occasions prior to this plaintiff had given professional attention to persons injured on defendant's trains at the request of this claim adjuster. His bills for services to these persons had been sent to defendant, in accordance with instructions of the claim adjuster, and had been paid by defendant. Plaintiff, relying upon the instructions of the claim adjuster with respect to this operation, and upon the ratification by defendant of similar instructions, with respect to injured persons on previous occasions, performed the operation on Lewis Hoffler. He contends that the evidence showing these facts was properly submitted to the jury upon his contention that the claim adjuster had apparent authority to make the contract on behalf of defendant upon which he has sued in this action.

It is not denied that the relation of principal and agent existed between defendant and the claim adjuster at the time plaintiff was instructed by the claim adjuster to perform the operation, and that at this time the claim adjuster was engaged in the performance of duties within the scope of his agency. Defendant as principal was bound by the acts of its agent within the scope of his actual authority; it is likewise bound by his acts within the scope of his apparent authority. Defendant having theretofore held this claim adjuster out as having authority as its agent to contract with plaintiff for professional services rendered to persons injured by the operation of its trains, cannot now be heard to deny that the claim adjuster had authority as its agent to make the contract in reliance upon which plaintiff performed services which the jury has found were of the value of $500. *Miller v. Cornell,* 187 N. C., 550; *Latham v. Field,* 163 N. C., 356.

There was no error in refusing to allow defendant's motion for judgment as of nonsuit.

The interesting question as to whether a claim agent employed by a railroad company to adjust claims for personal injuries resulting from the operation of its trains has authority implied from the nature of the duties of his employment to engage a physician or surgeon to render services to the injured person, and thereby to bind the railroad company for the payment of such services, is not presented by this appeal. It has been held that upon the facts of certain cases, such authority is implied, and that the physician or surgeon, who has rendered such services, upon such employment, may recover of the company the value of his services. See L. R. A., 1918-F, note, sec. 32, p. 60.

Other assignments of error have been carefully considered. They cannot be sustained. The judgment is affirmed. There is

No error.

I. E. RAMSEY v. LAURA G. DAVIS ET AL.

(Filed 23 March, 1927.)

1. **Deeds and Conveyances—Principal and Agent—Attorneys in Fact—Execution of Instruments.**

A deed by an attorney in fact to pass title to his principal's land, must not only expressly show that its execution was that of the principal, but it must also appear from the signature that it was the act and deed of the principal executed by the agent in his name.

2. **Same—Equity—Contracts—Title.**

Where in a partition for the division of lands among tenants in common, sole seizin by one of them is set up under a deed purporting to have been executed by an attorney in fact of the others, but the deed is insufficient to convey the title of the principals for want of stating this fact sufficiently in the body of the deed and in its execution, in the absence of allegation for equitable relief in behalf of the grantee in the supposed deed, and of necessary parties, the courts will not declare that the instrument operates in equity as a contract to convey under the doctrine that such courts will regard that as done which should have been done.

APPEAL by plaintiff from *Sinclair, J.,* at October Term, 1926, of CARTERET.

The plaintiff instituted a proceeding before the clerk for the partition of land and alleged that he and the defendants, Laura G. Davis, W. B. Blades, George J. Brooks, C. R. Wheatley, and J. F. Duncan, were the owners and in possession; that his interest was three-eighths, Mrs. Davis's one-half, and that the other defendants one-eighth; and that the land could not be divided to advantage and should be sold for partition.

Mrs. Davis filed an answer denying the plaintiff's allegations and pleading sole seizin. There was evidence that Mrs. Rhodes and her husband, Mrs. Shelton and her husband, and Mrs. Laura C. Davis (Hamlin) executed a power of attorney constituting J. H. Davis their attorney in fact to sell and convey their real estate. He signed a paper-writing purporting to be a deed executed "by J. H. Davis, attorney in fact for Fanny Rhodes and husband, and Laura C. Davis," etc., to

Laura G. Davis. The paper "witnesseth, that J. H. Davis, attorney in fact," etc., sells and conveys the land; "J. H. Davis, attorney in fact, etc., covenants," etc.; and "J. H. Davis, attorney in fact," signed his name under seal.

The appellant admits that he has no interest in the land if the title of Fanny Rhodes and Laura C. Davis (Hamlin) was conveyed by the alleged deed; but he contends that it does not purport on its face or by its terms to be the deed of the principals and that their interest in the land was not conveyed to the defendant Laura G. Davis. On appeal from the clerk the trial judge held that Laura G. Davis is sole seized and gave judgment accordingly. The plaintiff excepted and appealed.

C. R. Wheatley and J. F. Duncan for appellant.
Guion & Guion for appellees.

ADAMS, J. The decision in *Cadell v. Allen,* 99 N. C., 542, is controlling in the case at bar. There the "indenture was between D. Cuthbertson, attorney for Stephen Lacy, and Aaron Stegall," and was signed "D. Cuthbertson, attorney for Stephen Lacy." In reference to the sufficiency of the deed the Court said: "But if the power of attorney were sufficient the deed in question was not executed in pursuance of and in the proper exercise of the power. It everywhere in the body of it purported in terms to be that of 'D. Cuthbertson—attorney of Stephen Lacy,' etc.; he—not his principal—purported to convey the title, and as a consequence no title passed, for he had none to convey. The deed should, by its effective terms of conveyance, be and purport to be that of the principal, executed by his attorney, and to convey the estate of the principal. It is not sufficient that the attorney intended to convey his principal's estate, he must have done so, by apt words, however informally expressed, to effectuate that purpose. The distinct purpose of the principal to convey and the necessary form and operative words to convey his estate must appear in the body of the deed in all essential connections. His name should be signed, and purport to be signed, and his seal affixed by the attorney, but the signing will be sufficient, if it be by the attorney for the principal. In *Oliver v. Dix,* 21 N. C., 158, the deed in question, very much like the one before us, ran throughout in the name of 'Thomas Dix, attorney in fact for James Dix,' and was signed and sealed in the same way. *Chief Justice Ruffin,* delivering the opinion of the Court, said: 'It is clear that the deed offered to the plaintiff is altogether insufficient. No doubt the defendant intended to comply with the contract, and both he and the plaintiff thought he was doing so. But the deed does not purport to be the deed of James Dix, the owner, but of Thomas, as the attorney; allusion is not had to the method of signing only. It may not be material whether it be signed J. D., by T. D., or T. D. for J. D. But the instrument must profess in its terms to be the act of the principal.' To the same effect are *Scott v. McAlpin,* 4 N. C., 587; *Locke v. Alexander,* 8 N. C., 412; *Redmond v. Coffin,* 17 N. C., 437; *Duval v. Craig,* 2 Wheaton, 45, and note on page 56; *Appleton v. Brinks,* 5 East., 148."

See, also, *Woodbury v. King,* 152 N. C., 676; *Tiger v. Land Co.,* 41 L. R. A. (N. D.), 805, and annotation. It will be noted that the acknowledgment in the present case is not that of the principals, but of "J. H. Davis, attorney in fact."

The appellees contend that if this be granted, the defective instrument operates as a contract to convey and vests in the grantee an equitable title to the land. It is true that equity, regarding that as done which ought to be done, will protect and enforce rights arising from instruments which are defectively executed on the ground that they may operate as contracts to convey. *Willis v. Anderson,* 188 N. C., 479; *Vaught v. Williams,* 177 N. C., 77; *Robinson v. Daughtry,* 171 N. C., 200; *Woodbury v. King, supra; Rogerson v. Leggett,* 145 N. C., 7. This principle applies when equity is pleaded or facts as a basis of the equity are sufficiently alleged and all the parties to be affected are before the court. In the case before us, as in *Cadell v. Allen, supra,* no equitable cause of action is alleged; no equitable relief is demanded in the answer. Here, as was said by *Merrimon, J.,* "the action and the cause of action are simply at law," and so far as the record shows, neither J. H. Davis nor Fanny Rhodes nor Laura C. Davis (Hamlin) is a party to the present proceeding. The instrument therefore is not enforceable as a contract to convey. The judgment is

Reversed.

IN THE MATTER OF THE WILL OF K. W. PERRY, DECEASED.

(Filed 23 March, 1927.)

Wills—Holograph Wills—Animo Testandi—Statutes.

For a memorandum written and signed by the testator to take effect as his will, it must, among other requisites, show that it was made *animo testandi,* and where the other formalities have been observed, a "pack" or slips of paper pinned to a note in his favor, with the endorsement written thereon, and signed by him, a long time prior to his death, "I want S. W. have this pack," will not operate either as a valid holograph will or codicil. C. S., 4131.

APPEAL by caveators from *Bond, J.,* at August Term, 1926, of FRANKLIN.

Issue of *devisavit vel non,* raised by a caveat to a paper-writing propounded as the last will and testament of K. W. Perry, deceased.

From a verdict and judgment in favor of propounders, the caveators appeal, assigning errors.

G. M. Beam and W. M. Person for caveators.
W. H. Yarborough for propounder.

STACY, C. J. K. W. Perry, a resident of Franklin County, died in January, 1922. Soon thereafter an administrator was appointed who duly qualified and entered upon the administration of his estate. In November, 1925, Mrs. Siddie Williams, a daughter of the deceased, presented to the clerk of the Superior Court for probate, as the last will and testament of her father, a note for $1,500, executed under seal by her husband, J. R. Williams, and W. H. Allen to K. W. Perry, 18 March, 1915, due and payable one year after date, which said note had pinned to it a small slip of paper, with the following notation, in the handwriting of the deceased, written in pencil thereon:

"I want Siddie Williams have this pack. K. W. Perry."

It is the contention of the propounders that this memorandum constitutes a valid testamentary disposition of the accompanying note, as above described. For this position, they rely upon the cases of *Alexander v. Johnston,* 171 N. C., 468, *In re Harrison,* 183 N. C., 457, *In re Edwards' Will,* 172 N. C., 369, and *Smith v. Eason,* 49 N. C., 34.

Conceding for the moment that the paper-writing is in the handwriting of the deceased, with his name subscribed thereto, and that it was found after his death among his valuable papers and effects (C. S., 4131), still there is not sufficient evidence on the record to show that it was intended as a *testamentary* disposition of the "pack" or note to which it is attached. "The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written *animo testandi.* It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it."—*Brown, J.,* in *Spencer v. Spencer,* 163 N. C., 83. Or as said by *Furches, J.,* in *Alston v. Davis,* 118 N. C., 214, "a man cannot make a will 'onbenowins' to himself."

It will be observed that the language used is simply, "I want Siddie Williams have this pack," and there is nothing to indicate when he wanted her to have it. He does not say he wants her to have it at his death or in case of his death. A will is a disposition of property to take effect on or after the death of the owner. *In re Edwards' Will, supra; Payne v. Sale,* 22 N. C., 457.

It is provided by C. S., 4131, that no holograph will shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such will be found among the valuable papers and effects of the deceased person, or shall have been lodged in the hands of some person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part thereof. *St. John's Lodge v. Callender,* 26 N. C., 335; *Simms v. Simms,* 27 N. C., 684.

The memorandum in question must have been written several years before the deceased's death, for he was paralyzed in 1920, and was not able to write thereafter. His notes and papers, including the ones here offered for probate, were taken from his trunk in June, 1921, by his children, and placed in a safety deposit box where they were kept until a guardian was appointed some time thereafter. The deceased lost his mind in February, 1921, and it is not contended that he lodged the script in the hands of any person for safe-keeping as a will. *In re Jenkins,* 157 N. C., 429.

We think the caveators were entitled to the peremptory instruction as asked, that the paper-writing propounded is not the last will and testament of the deceased.

New trial.

STATE v. MABLE ASWELL AND JOE SMITH.

(Filed 23 March, 1927.)

Criminal Law — Evidence—Fornication and Adultery — Prostitution—Husband and Wife—New Trials.

On a trial of the defendants for the criminal offense of prostitution, assignation, and fornication and adultery, mere neighborhood rumors are incompetent; and the wife may not testify to the acts and conduct of her husband, the codefendant, that tend to convict him of the crime charged.

CRIMINAL ACTION, before *Stack, J.,* at December Term, 1926, of GREENE.

The defendants were tried upon a warrant charging them with prostitution and assignation, and fornication and adultery. The cause was transferred to the county court of Greene County, and the defendants were convicted and appealed to the Superior Court. Upon trial in the Superior Court they were convicted and the defendant, Joe Smith, sentenced to work the public roads.

The evidence tended to show that the defendant, Joe Smith, had been a minister for sixteen years, serving churches in Wayne and Greene counties; that he had been married for over thirty years. The defendant, Mable Aswell, was a member of the same church of which the defendant, Smith, was pastor. The husband of Mrs. Aswell died in 1924, and the defendant Smith and his wife went to live at the home of Mrs. Aswell, where they remained about three months during the year 1925, and thereafter moved away.

The evidence further tended to show that prior to the death of her husband the defendant, Mable Aswell, had been a respected and loved woman in her neighborhood.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

No counsel for defendants.

BROGDEN, J. Exception No. 1 is to a portion of the testimony of a witness for the State as follows: "Soon after Joe Smith and wife came to live there, I spoke to him about a report that was circulated in the community. (Q.) What was the report? (A.) The people in the community said that it was improper for Joe Smith to live in the house with Mrs. Aswell."

Exception No. 2 was to the testimony of another State's witness as follows: "Soon after the death of Mr. John Aswell reports were circulated in the neighborhood. (Q.) What was this report? (A.) It was reported that he was frequently seen in company with Mrs. Aswell."

The defendants in apt time objected to the testimony, and it was admitted as evidence in the case.

The evidence objected to is no more than mere neighborhood rumor and community gossip, and was incompetent. *Hopkins v. Hopkins,* 132 N. C., 25; *S. v. Holly,* 155 N. C., 486; *S. v. Jeffreys,* 192 N. C., 190.

The third exception relates to testimony of the wife of the defendant, Joe Smith, who was asked the following question: "(Q.) What presents, if any, did Mrs. Aswell give your husband? (A.) Just before conference she gave to him a Ford automobile and a suit of clothes. (Q.) After you moved back to Wayne County did you ever see your husband in company with Mrs. Aswell? (A.) Yes, after we moved back to Wayne County Mrs. Aswell would often drive by our house, which was situated on the Goldsboro-Snow Hill Highway; she would blow and my husband would go out to the car and talk to her."

Even if this evidence had any probative value at all or constituted a link in a chain of circumstances, it would be inadmissible, for the reason that the wife cannot testify against the husband in a case of this sort. *S. v. Raby,* 121 N. C., 682; *Grant v. Mitchell,* 156 N. C., 15; *Powell v. Strickland,* 163 N. C., 393.

The Assistant Attorney-General, with his usual candor, confesses error in the particulars mentioned. Indeed, there was no evidence warranting a submission of this case to the jury, and the motion for nonsuit should have been allowed.

Reversed.

H. G. WILLIAMS ET AL. v. H. EUGENE COX, ADMINISTRATOR OF A. G. COX ET AL.

(Filed 23 March, 1927.)

Appeal and Error — Pleadings — Evidence — Insufficient Record—New Trials.

It appearing in this case on appeal that taking the allegations of the complaint into consideration with the indefiniteness of the record of the trial upon the question of want of authority for the cancellation of a mortgage on the books of the register of deeds creating a lien upon lands subsequently conveyed, that a disposition of the case would be unsatisfactory, a new trial is ordered.

APPEAL by the defendant Albert Williams from *Sinclair, J.*, at January Term, 1927, of DUPLIN. New trial.

Langston, Allen & Taylor for appellees.
A. S. Grady and D. H. Bland for appellant.

ADAMS, J. On 30 September, 1920, the intestate, A. G. Cox, conveyed to M. W. Pope, one of the defendants, a tract of land in Duplin County, and accepted from Pope and his wife a mortgage deed securing notes aggregating $12,200. One of these, the note sued on, was endorsed in blank by A. G. Cox, and transferred to the plaintiffs before maturity.

In 1922 Pope surrendered possession of the land to Cox, but executed no deed; and the next year Pope was adjudged a bankrupt, and the land was listed in his schedule as assets and liabilities. Some time during the latter year Pope and his wife and A. G. Cox, the mortgagee, conveyed the land to the defendant, Albert Williams. The mortgage was registered, and it is alleged by the plaintiffs that on the margin of the registry there is an entry purporting to have canceled the security, but that the purported cancellation was made without authority. D. G. Rhodes, one of the defendants, held a prior mortgage on the land securing an indebtedness of $2,000.

Two issues were submitted: (1) "Are the plaintiffs the owners and holders for value and before maturity of the note sued upon? (2) Does the mortgage securing said note, recorded in Book 217, page 574, Duplin

County, registry, constitute a valid lien upon the lands therein described?" The jurors were instructed to answer the first issue "Yes," if they found the facts to be as shown by the record evidence and testified to by the witnesses and to answer the second, "Yes" if they found the facts to be as shown by the record evidence.

The record purporting cancellation of the mortgage was not formally introduced, but the allegation of the plaintiff is that the attempted cancellation of the mortgage was unauthorized and therefore illegal and void. The objection seems to be not so much the form of the marginal entry as the want of authority to make it. Part of the record, when considered in connection with the allegations, is indefinite, and we are of opinion that a satisfactory disposition of the controversy requires a more complete development of the facts under pertinent issues and instructions, particularly with reference to the question of authority for the purported cancellation and, in view of the outstanding note, of the transfer of title to the defendant Williams.

New trial.

C. H. FOWLER v. H. H. UNDERWOOD.

(Filed 23 March, 1927.)

Negligence—Automobiles—Highways—Intersecting By-ways—Collisions—Consequent Damages—Proximate Cause.

In approaching a highway from a yard the driver of an automobile must have his car under control, and not exceed a speed of ten miles an hour, and also give timely signals of its approach, C. S., 2616, and evidence of his failure to do so causing an accident to another car being properly driven on the highway, is sufficient of actionable negligence to take the case to the jury; and the fact that this negligence did not actually result in a collision of the two cars, but proximately caused the injury in the reasonable effort of the driver of the plaintiff's car to avoid it, does not vary the application of the rule.

APPEAL by plaintiff from *Bond, J.*, at December Term, 1926, of WAKE.

Douglass & Douglass for plaintiff.
Parker & Martin and W. B. Jones for defendant.

ADAMS, J. The plaintiff instituted this action to recover damages for personal injury alleged to have been caused by the negligence of the defendant. At the close of the evidence the defendant's motion for nonsuit was granted and from the judgment rendered the plaintiff appealed.

There was evidence tending to show that on 28 June, 1925, the plaintiff was riding with others on the public highway near Smithfield in his own car, which was driven by Milton Bradley at the speed of fifteen or twenty miles an hour; that the defendant drove his car at the rate of twenty or thirty miles an hour into the right side of the highway from an adjacent yard; that the defendant's car was concealed from the occupants of the plaintiff's car by a hedgerow which extended almost to the road; that the defendant did not sound his horn or give any other signal or warning of his entrance into the highway; that the plaintiff's car was carefully operated on the right side of the road; that the driver first saw the defendant's car at a distance of ten or fifteen steps, and then in order to avoid a collision turned the plaintiff's car to the right, struck a mail box, lost control, wrecked the car, and injured the plaintiff. The defendant offered evidence which was in direct conflict with that of the plaintiff.

The evidence tends to establish the allegations in the complaint, and when considered in the light most favorable to the plaintiff, as it must be in case of nonsuit, it is strong enough to admit of its submission to the jury on an issue as to the defendant's negligence. Upon approaching an intersecting highway any person operating a motor vehicle must give a timely signal, have his car under control, and operate it at a speed not to exceed ten miles an hour. C. S., 2616. The word "intersecting" has been construed as synonymous with "joining" or "touching" or "entering into." *Manly v. Abernathy,* 167 N. C., 220. In coming from the yard the defendant therefore was in the act of approaching an intersecting highway. True, there was no actual collision of the cars, but this was not indispensable to the plaintiff's cause of action. If the plaintiff was suddenly confronted by peril through the negligence of the defendant and the plaintiff's driver, under reasonable apprehension that a collision would occur if he did not turn his car to the right, acted as a reasonably prudent person would have acted under the same or similar conditions in an effort to extricate his car from the danger, and the car in consequence was wrecked and the plaintiff was injured, the injury would be regarded as the direct consequence of the defendant's negligence. *Crampton v. Ivie,* 124 N. C., 591, in which a rehearing was granted on another point in 126 N. C., 894; *Johnson v. R. R.,* 163 N. C., 431, 444; *Hinton v. R. R.,* 172 N. C., 587; *Bowen v. Schnibben,* 184 N. C., 248; *Dreher v. Devine,* 192 N. C., 325.

We think the plaintiff is entitled to have the appropriate issues submitted to the jury.

Reversed.

THE ROYAL INSURANCE COMPANY ET AL. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 23 March, 1927.)

1. **Insurance, Fire—Payment of Loss—Subrogation—Actions.**

   A fire insurance company which has paid the damages for a fire loss covered by its policy, is subrogated to the rights of the insured to maintain an action against the railroad company for its negligence in setting out the fire which caused the loss.

2. **Issues—Contributory Negligence—Evidence—Appeal and Error.**

   Where the evidence is conflicting as to the contributory negligence of the insured in an action to recover damages sustained in the loss of goods by fire, alleged to have been caused by the defendant's negligence, and the issue properly arises in the case, it is error for the trial judge to refuse an issue thereon to the jury.

APPEAL by defendant from *Devin, J.*, at September Term, 1926, of SAMPSON.

Civil action to recover damages for an alleged negligent burning of cotton, insured by plaintiffs and paid for by them under their policies of insurance. Plaintiffs base their right of action on the theory of subrogation. Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the cotton of Bethune-Colwell Company (which was insured by the plaintiffs and loss of which was paid for by them) burned by the negligence of the defendant, as alleged in the complaint? A. Yes.

"2. What damage, if any, are the plaintiffs entitled to recover? A. $9,075.86, with interest from time policies were paid."

From a judgment on the verdict in favor of plaintiffs, the defendant appeals, assigning errors.

Butler & Herring for plaintiffs.
A. McL. Graham and Rountree & Carr for defendant.

STACY, C. J. In bar of plaintiff's right to recover, the defendant pleads, and, at the trial, offered evidence tending to show that the burning of the cotton in question was due to the contributory negligence of the owner, Bethune-Colwell & Company. In apt time, the defendant tendered the following issue:

"2. Was Bethune-Colwell & Company guilty of negligence which contributed to the damages for which this action is brought to recover, as alleged in the answer?"

His Honor declined to submit this issue, doubtless for the reason that the testimony of a number of the defendant's witnesses was to the effect that the agents of the assured, Bethune-Colwell & Company, or the owner of the cotton, had cleaned the platform where the cotton was stored, just a short while before the fire, and, hence, if this evidence were believed, no contributory negligence had been shown on the part of the owner. The vice of this ruling lies in the fact that other evidence offered by the defendant was to the contrary. The conflict in the evidence must have been overlooked by the learned judge while busily engaged in the trial of the cause. *Smith v. Coach Line,* 191 N. C., 589; *Shell v. Roseman,* 155 N. C., 90.

On the record, we think the defendant is entitled to have the issue of contributory negligence submitted to the jury. *Wilson v. Bush,* 70 W. Va., 26, 73 S. E., 59; *Svea Ins. Co. v. Vicksburg S. & P. Ry. Co.,* 153 Fed., 774.

In the case last cited it was held (as stated in the first head-note): "An insurance company, which paid a loss to the owners of cotton destroyed by fire, is subrogated to the right of such owners to maintain an action against a railroad company to recover damages, on the ground that the fire was caused by its negligence, such action being subject to the same defenses that might be invoked against the owners of the cotton had it been brought by them."

For the error, as indicated, there must be a new trial, and it is so ordered.

New trial.

W. J. WINSTEAD AND WIFE, IOLA WINSTEAD, J. C. WINSTEAD AND WIFE, DELLA WINSTEAD, W. E. WINSTEAD AND WIFE, PAULINE WINSTEAD, R. S. WINSTEAD AND WIFE, MARY WINSTEAD, BETTIE WINSTEAD ALFORD AND HUSBAND, Z. T. ALFORD, AND GRACIE WINSTEAD v. LULA D. FARMER, EXECUTRIX OF THE ESTATE OF WILEY W. FARMER, AND LULA D. FARMER.

(Filed 23 March, 1927.)

1. Contracts—Estoppel—Wills—Devise.

The deceased having taken lands by devise subject to a charge of five hundred dollars in favor of M., and by purchase from B. a certain other tract of land, died leaving a will by which he bequeathed the heirs at law of M. now deceased intestate, certain sums of money in lieu of their shares in the said five hundred dollars, with further provision that should said heirs at law be paid moneys by him during his life, it would be in lieu of the amount they would receive under his will: *Held,* a receipt signed by such heirs at law, of full age, for sums of money so paid, was an estoppel by contract to declare a parol trust in favor of M., their ancestor. The modern doctrine of estoppel and election discussed by CLARKSON, J.

2. Same—Receipts.

Where the testator devises certain sums of money to be accepted by the heirs at law of M., deceased, in lieu of a charge made upon lands previously devised to him by the ancestor of M., with provision that moneys devised to said heirs by the testator were to be received by them in satisfaction of that given to them respectively, moneys so accepted by them in the testator's lifetime when the devisees were of age, and receipt given with reference to the will, will impute to them knowledge of the provisions of the will, and will operate against them as an estoppel by contract.

CONNOR, J., not sitting.

APPEAL by defendants from *Barnhill, J.*, at November Term, 1926, of WILSON. Modified and affirmed.

The necessary facts will be set forth in the opinion.

W. A. Finch, M. S. Strickland, Woodard & Rand, and Manning & Manning for plaintiffs.

S. G. Mewborn and Connor & Hill for defendants.

CLARKSON, J. (1) Adelphia Farmer died prior to 27 November, 1899, leaving a last will and testament dated 18 January, 1881, duly probated in Wilson County, N. C., in which she devised to Wiley W. Farmer a certain tract of land in said county, subject to a charge of $500 to be paid Mary F. Winstead upon her arrival at the age of 21 years. Adelphia Farmer was the grandmother and Wiley W. Farmer the uncle of Mary F. Winstead.

(2) Mary F. Winstead died in August, 1906, and left surviving J. C. Winstead, her husband (who since married Della Winstead), and the following children: (a) W. J. Winstead, (b) W. E. Winstead, (c) R. S. Winstead, (d) Gracie Winstead, (e) Bettie Winstead Alford, all of whom, with their respective wives and husband, and one unmarried, are plaintiffs in this action.

(3) Lula D. Farmer has duly qualified as executrix of the last will and testament of her husband, Wiley W. Farmer, and in her official and individual capacity is defendant in this action.

(4) John F. Bruton, commissioner, sold on 27 November, 1899, to Wiley W. Farmer, for $425, a tract of land in fee simple purchased by him as the highest bidder at commissioner's sale. Deed for the said land was executed 21 December, 1899, and duly recorded. This was a tract of land containing about seventy acres, and a partition proceeding was brought by Wiley W. Farmer, who owned two-fifths undivided interest, against the Joyners, who owned three-fifths interest. Wiley W. Farmer died in February, 1924, leaving the said tract of land to defendant,

Lula D. Farmer. At the time Wiley W. Farmer purchased this land Mary F. Winstead had reached the age of 21 years.

The contentions: Plaintiffs allege that the land was purchased by Wiley W. Farmer from John F. Bruton, commissioner, with the money left by Adelphia Farmer and held in trust by him for Mary F. Winstead and her heirs; that it was agreed between Mary F. Winstead and Wiley W. Farmer that title was to be taken in her name, but through inadvertence or mistake it was taken in Wiley W. Farmer's name; that immediately after the purchase she and her husband moved on the land and paid the tax; that in 1906 Mary F. Winstead died and her husband, in 1909, moved off the land and went to Elm City, N. C., to live; that Wiley W. Farmer repeatedly stated that he was holding the land for the use and benefit of Mary F. Winstead, and at her death reiterated the statement for her children, plaintiffs in this action. It is alleged that he had frequently promised to reconvey the land.

Defendant denied the allegations of plaintiffs and alleged that as to Mary F. Winstead living on the land with her husband, J. C. Winstead, it was because they had several children and had no land; that it was the agreement that they should live there without rent and pay the tax in lieu of Wiley W. Farmer paying interest on the $500; that they lived on the land until 1906, when Mary F. Winstead died and her husband, in 1909, left it, and Wiley W. Farmer took immediate possession of the land and received the rents until his death, and no demand was ever made on him for the land by Mary F. Winstead before her death or by the plaintiffs, her husband and heirs at law; that Wiley W. Farmer had been in the possession of the land some fifteen years after Mary F. Winstead's death before this action was brought.

Wiley W. Farmer made his last will and testament on 22 August, 1912. Among other things mentioned, in Item 3, he recites the fact of the $500 left by Adelphia Farmer, and says: "It will be seen that my mother devised certain land to me and directed that I should pay to my niece, Mary Florence Farmer, who afterwards married Jesse C. Winstead, the sum of $500; during the life of the said Mary Florence Winstead, she and her husband occupied a tract of land owned by me for which I charged no rent, upon the agreement with her that the sum of $500 should not bear interest; the said Mary Florence Winstead and her husband occupied the tract of land until 1 January, 1909, under the agreement aforesaid for this reason, in fixing the said date the date from which interest on the sum of $500 is to be calculated, and it is my purpose that the sum of $500 herein directed to be paid to the issue of the said Mary Florence Winstead, shall be in full payment and satisfaction of any and all claims which she or any one claiming under her now has, or may have against my estate or against the land devised to me by my mother as aforesaid, and the acceptance by the issue of the said Mary Florence Winstead of the said sum, as well as of the further sum of one-third of the proceeds of the sale of the said farm shall be, and shall be deemed a full release of my estate and of the tract of land devised to me by my mother therein of all claims which they or any one of them shall have against my estate."

In a codicil dated 24 December, 1913, he recites that he has sold the land mentioned in Item 3 of the will, and in lieu in Item 1: "I direct my executrix named in said will out of any money in her hands belonging to my estate, to pay to the issue living at my death of my deceased niece, Mary Florence Winstead, wife of Jesse C. Winstead, per stirpes and not per capita, the sum of $500, with interest thereon at the rate of six per cent from 1 January, 1909, until paid, and if said sum, with interest, does not amount to $1,000, then I direct my said executrix to add thereto a sufficient amount to make the amount paid to the said issue of my deceased niece $1,000; the said sum to be accepted and received by the said issue in full settlement, satisfaction and discharge of any and all claims which they may have against me or my lands by reason of the matters and things set out in said Item 3 of said will."

In a codicil dated 10 June, 1916, he recites: "Whereas, by Item 1 of the said codicil, dated 24 December, 1913, I directed by executrix to pay to the issue living at my death of my deceased niece, Mary Florence Winstead, per stirpes and not per capita, a sum of money therein expressed; in any event not less than one thousand dollars; and, whereas, now some of the children of my niece have arrived or are about to arrive at the age of twenty-one, and have called upon me for money, and I have paid or contemplate paying them or some of them certain sums in lieu of their interests or the interests of their issue in said sum named in said Item 1 of said codicil. Now, therefore, in the event that I shall pay to any child or children of my deceased niece any sum of money during my lifetime and shall take receipt for same, I direct that my executrix shall not pay to such child or to the issue of such child, or to such children or to the issue of such children, any share or shares in said sum, but as to such child or children or to the issue of such children, the legacy shall be deemed revoked; provided, however, he, she or they shall be considered in determining the number of shares into which the same shall be divided, and my executrix is directed to pay to such child or children or the issue of such child or children to whom I have paid any sums during my lifetime, his, her or their share, as provided in Item 1 of said codicil."

We have set forth the reference to the $500 in the will and codicils. The will and codicil of 24 December, 1913, are especially material upon the plea of estoppel made by defendant. Three of the plaintiffs, after the execution of the will and codicils, (1) W. E. Winstead, on 16 September, 1916, for $146.50; (2) W. J. Winstead on 8 August, 1917, for $151.50; (3) Bettie W. Alford on 23 October, 1920, for $182.54, signed, sealed and delivered to Wiley W. Farmer the following paper-writings, all duly witnessed, all similar to the W. E. Winstead except the amounts:

"Received of W. W. Farmer, one hundred forty-six and 50/100 dollars in full payment of any sum due me as a child of Mary Florence Winstead, by the said W. W. Farmer, by virtue of the last will and testament of Adelphia Farmer, and in satisfaction of any interest that I may have in any legacy contained in the last will of the said W. W. Farmer. Witness my hand and seal this 6 September, 1916. W. E. Winstead. (Seal.) Witness, E. A. Darden."

The record shows that the court below charged the jury correctly, and there are no exceptions to the charge: "The only question presented by this appeal is the exception and assignment of error to the judgment rendered, and the refusal of the trial judge to sign the judgment tendered by the defendant, and the controversy is as to the force and effect of the receipts and releases executed by the plaintiffs, who are the real parties in interest, set out in the defendant's answer and found by the jury to have been executed."

The following issue was answered by the jury "Yes":

"Did Wiley W. Farmer receive title to the premises described in the complaint under deed dated 21 December, 1899, recorded in Book 55, at page 338 in trust for the use and benefit of Mary Florence Winstead, as alleged?"

It is admitted that J. C. Winstead, the husband of Mary F. Winstead, who held a life estate, as tenant by the curtesy, was barred and he and his second wife, Della, plaintiffs in the present action, submitted to a voluntary nonsuit.

The judgment of the court below, in part, was as follows: "The court is of the opinion, and so holds, that the receipts of W. E. Winstead, W. J. Winstead and Bettie Winstead Alford, respectively, of the several amounts paid in by W. W. Farmer, deceased, and the signing by them of the receipts as determined by the jury, was not an election of remedy on the part of the said plaintiffs, and the court is further of the opinion and so holds, that said respective plaintiffs are not estopped thereby from prosecuting this action."

We think that W. E. Winstead, W. J. Winstead and Bettie W. Alford are all estopped. They were all *sui juris.* The language of the paper-writings is clear and explicit, and they knew, or by the use of due care should have known the provisions in the will and codicils of Wiley W. Farmer. The will and codicils set forth in detail the whole history of the $500 legacy left by Adelphia Farmer. There was no fraud or mutual mistake invoked. The receipts, which are under seal, state in plain English that the amount is *in full payment* (1) any sum due as a child of Mary Florence Winstead by virtue of the will and testament of Adelphia Farmer; (2) *in satisfaction* of any interest in any legacy the party may have contained in the last will of said Farmer.

At the time this money was paid by Wiley W. Farmer to the three children of Mary F. Winstead, there was no suggestion by them, so far as the record shows, that the land Wiley W. Farmer purchased from John F. Bruton, commissioner, was held in trust. The recital in the will and codicil which they knew or ought to have known by the exercise of ordinary care when they signed the paper-writings under seal, (1) shows that he did not purchase the land in trust; (2) that the sum in money paid them "to be accepted and received by the said issue *in full settlement, satisfaction and discharge of any and all claims* which they may have against *me or my lands by reason* of the matters and things set out in said Item 3 of said will."

In *Young v. Grote,* 4 Bing., 253 (1827), Shirley's Leading Cases, 3 ed., p. 400, it is said: "Estoppels (which Lord Coke considered 'a curious and excellent sort of learning'), are of three kinds: (1) By matter of record; (2) by deed; (3) by conduct (otherwise known as *in pais)* . . . (p. 402). The doctrine of estoppel by conduct as extracted from *Pickard v. Sears,* 6 A. & E., 469, and *Freeman v. Cooke,* 2 Ex., 654, may, without attempting scientific precision, be thus stated: Where one person by his words or conduct represents a certain state of things to exist, and thereby induces—no matter whether he intended it or not—another to alter his position, that other is not to be prejudiced by the perfidy or fickleness of the first person." *Meyer v. Reaves, ante,* at p. 178.

Bigelow on Estoppel, 6th ed. (1913), under Estoppel *in Pais,* ch. 13, p. 489, speaking to the subject, says: "Estoppel *in pais* arises (1) from contract; (2) independently of contract, from act or conduct which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged; and it designates some present or past fact fixed by or in virtue of the contract, or of the act or conduct in question. . . . (p. 491). The whole subject, as we have intimated, is modern, and, rejecting most of the old nomenclature, may be considered under two or three heads having modern names. One class of cases is designated in this work as Estoppel by Contract, a term which is intended to embrace (1) *all classes in which there is an actual or virtual undertaking to treat a fact as settled, so that it must stand specifically as agreed,* (italics ours) and (2) all cases in which an estoppel grows out of the performance of the contract by operation of law. Whether all the cases here referred to ought to be called estoppels is now probably too late to inquire, for it would be vain to resist the current. Much of it must certainly have fallen without the lines of estoppel as laid down by Coke; how some of it, had it arisen, would have been disposed of, is not clear. The truth appears to be that the requirements of modern society could not have been expressed in the terms of the old law, and the band had to be unloosed. . . . (p. 492). Besides these two classes of cases, the doctrine, or at least the name, of estoppel has been extended during the present century, and especially within thirty or forty years past, to a variety of cases, embraced in the present work under the heads of Election, and Inconsistent Positions, herein called *Quasi*-Estoppel, and follows the two subjects before mentioned. . . . Thus in the case of waiver of rights, which is often called a case of estoppel by conduct, the ground upon which the waiver rests is, at least in ordinary cases, knowledge by *both* parties of the facts; it is not to be supposed that by calling the case 'estoppel by conduct' knowledge of facts on the part of the one claiming the waiver is fatal, as in the typical example of estoppel by conduct, to wit, misrepresentation of some fact (p. 493). This is enough to indicate that there may be danger in using the term 'estoppel' freely. It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel, at best. An estoppel is certain, being a legal inference or conclusion arising from acts or conduct; while acquiescence and ratification, like waiver, are but matters of fact which might have been found otherwise."

There are so many variant attitudes of estoppel that we quote fully from Mr. Bigelow. The kind we consider applicable in the present action is a liberal and modern view, founded on agreement or contract.

It has been said "An estoppel *in pais* is to be resorted to solely as a measure to prevent injustice—always as a shield, but never as a sword."

In *Overall Co. v. Holmes,* 186 N. C., at p. 431, among the definitions given of contract, is the following: "Contract is the agreement of two minds, the coming together of two minds on a thing done or to be done."

The language of the paper-writing, in the present case, is the "coming together of two minds." The settlement by parties of full age, *sui juris,* with full knowledge of their rights. The paper-writing in controversy shows a complete offer and acceptance and an adjustment and satisfaction.

In the case of *Kerr v. Sanders,* 122 N. C., at p. 635, defendants sent plaintiff a check on which was written "in full for services." Plaintiff endorsed on the check "Accepted for one month's services," etc. The Court said: "The plaintiff must have known what was meant by the words written on the face of the check 'in full for services,' enclosed in the letter discharging him from the service of defendants. It is certain he was not inadvertent to this language, 'in full for services,' as he would not have endorsed on it 'accepted for one month's service,' etc., and the jury have found against him. The plaintiff had no right to change this check or to accept it for any other purpose than that stated in the letter and check. *Long v. Miller,* 93 N. C., 233; *Pruden v. R. R.,* 121 N. C., 509. This doctrine is based on the idea of contract. 'It takes two to make a contract.' The offer of the defendants and the acceptance by the plaintiff was a contract—a meeting of minds." *DeLoache v. DeLoache,* 189 N. C., 394; *Colt v. Kimball,* 190 N. C., at p. 172; *Refining Corp. v. Sanders, ibid.,* at p. 209; *Cook v. Sink, ibid.,* at p. 631; *Schofield v. Bacon,* 191 N. C., 253.

It is said in *Freeman v. Ramsey,* 189 N. C., at p. 796, citing numerous authorities: "When the facts recited in deeds are of the essence of the contract, and where the intent of the parties to place a fact beyond question or to make it the basis of the contract is clear, the recital is effectual and operates as an estoppel against parties and privies." *Hays v. Askew,* 50 N. C., 63; *Meyer v. Reaves, ante,* 172.

In *Wright v. Fertilizer Co., ante,* 305, *Mr. Justice Brogden,* in a well considered opinion, held that the plaintiff Wright could not recover. The facts disclose that Wright kept the minutes of the corporation, and at a regular meeting in 1919 in the minutes had written the following: "Ordered that George W. Wright be paid a salary of $5,000 for the year 1919." At a meeting of the directors in 1920 he wrote in the minutes, "On motion, duly seconded, it was ordered that G. W. Wright be paid a salary of $6,500 for the year 1920." The salary was paid for 1919, and he drew the pro rata salary for ten months of 1920 at the fixed amount of $6,500 for the year and the remaining two months he drew $150 a month. Wright brought suit alleging that in December, 1919, the Fertilizer Company employed him for a period of five years, beginning 1 January, 1920, at a salary of $6,500 a year; that he was paid at this rate until November, 1920, when the payments to him were reduced to $1,800 a year, and afterwards increased to $2,100 a year. He was discharged in March, 1923. The suit was brought for $7,870.77, balance due on salary, etc. Plaintiff did not assert his right until after lapse of some four years, gave no notice to the corporation of his claim for five years at $6,500 a year before suit, and waited until the corporation passed into the hands of other parties. Plaintiff's salary was changed, which he accepted until he was discharged, and the record does not disclose that he made any protest or gave any notice whatever to the corporation as to his contention that he had a five-year contract for $6,500 a year. "The principle applicable to this state of facts is thus declared in *Hill v. R. R.,* 143 N. C., 557: 'It is a general rule of law, as well as of good morals and fair dealing, that if a party is silent when he should speak or supine when he should act, he will not afterwards be permitted to either speak when he should be silent or to act when he has failed to do so at the first proper and opportune moment.' Applying these principles of law to the facts appearing upon the record, we hold that the plaintiff cannot now be heard to claim his excess salary."

The paper-writings in the present action were signed by W. E. Winstead, W. J. Winstead and Bettie W. Alford, in 1916, 1917 and 1920, respectively. The present action was begun 20 August, 1925—many years after the paper-writings were given.

Taking into consideration the language of the paper-writings and the setting of the parties, we think the paper-writings were clear and explicit and an estoppel by contract.

There is nothing more important than the keeping of contracts. A high compliment among men of honor is the expression that "He is a man of his word." In the present case, as so often said, "The written word abides."

The judgment below is modified according to this opinion.

Modified and affirmed.

CONNOR, J., not sitting.

A. D. WADFORD, GUARDIAN, v. W. P. GILLETTE, TRUSTEE, ET AL.

(Filed 23 March, 1927.)

1. **Appeal and Error—Reference—Evidence—Review—Presumptions.**

The facts found by the referee upon sufficient legal evidence, approved by the trial judge, are not reviewable by the Supreme Court on appeal, and where the evidence is not set out in the record, the findings by the trial judge are presumed to be sustained by sufficient evidence.

2. **Contracts—Insane Persons — Adjudication of Insanity — Void Contracts.**

Contracts made with one after she has been officially adjudged to be insane and lacking in mental capacity to execute them are void, and voidable only when made before such official determination.

3. **Same—Voidable Contracts — Restitution of Consideration — Status Quo—Equity.**

One dealing with a person knowing her to be insane, or of insufficient mental capacity to make a contract, is deemed to have perpetrated a fraud upon her and her rights; but where the person thus dealing with her does so in good faith without notice of her mental incapacity, and pays a valuable consideration which cannot be restored or the parties cannot be put in *statu quo*, the contract so executed is valid and enforceable.

4. **Same—Burden of Proof—Knowledge—Restitution—Consideration.**

Where the mental incapacity or insanity of the party to a contract sued on has been shown in evidence in an action thereon, the burden is on the party claiming thereunder to show, when relied on, that he was ignorant of the fact of such incapacity, and without notice of such facts as would put a reasonably prudent man upon inquiry; that the transaction was fair and no advantage was taken, and that restitution of the consideration or adequate compensation could not be made.

5. **Contracts—Insane Persons—Mental Incapacity—Husband and Wife—Consideration—Equity—Estate by Entireties.**

Where the insanity or mental incapacity of a married woman is set up in a suit to declare a mortgage void executed by her and her husband on her separate lands, the fact that in the course of the transaction she had acquired an estate to lands in entireties with her husband, had lived thereon for years enjoying with him the profits thereof, and that her separate lands had been appreciably relieved of certain mortgage liens, is sufficient consideration to be considered by a court of equity upon the doctrine of restitution in placing the parties in *statu quo.*

6. **Mortgages—Deeds and Conveyances—Assumption of Mortgage Debt—Principal and Surety.**

Where lands are encumbered with a mortgage and the mortgagor conveys them to a third person who assumes the outstanding mortgage as between the mortgagor and the purchaser, the mortgagor occupies the place of surety against whom the mortgagee may proceed to collect the deficiency of the price the land had brought at the foreclosure sale.

7. **Contracts—Insane Persons—Bills and Notes—Negotiable Instruments—Due Course.**

The same principles that control contracts of insane persons apply to negotiable instruments in the hands of an innocent holder in due course for value. C. S., 3033.

8. **Reference—Appeal and Error—Referee's Report — Interpretation—Findings of Fact—Conclusions of Law.**

Whether an item of the report of a referee is a finding of fact or conclusion of law may be determined by the Supreme Court on appeal from an interpretation of his report set out in the record.

CIVIL ACTION, before *Barnhill, J.,* at November Term, 1926, of NASH.

The action was instituted by A. D. Wadford, guardian of Rachael Frances Baker, v. W. P. Gillette, trustee in the deed of trust, which was the subject of controversy, and James T. Gillette, payee in the note in controversy, and State Bank of Portsmouth, Va., the holder of said note.

The cause was by consent of counsel referred to H. G. Connor as referee to find the facts and state the conclusions of law. After hearing the evidence and argument of counsel the referee made his report. The findings of fact by the referee are voluminous, but are clear and succinct, presenting every phase of the controversy, and for that reason the entire report is set out in full and is as follows:

1. That prior to 1 January, 1921, Rachael Frances Baker, the wife of J. W. Baker, was the owner in fee simple and in the possession of a certain tract of land lying and being in Nash County, North Carolina, North Whitakers Township, and being lot No. 3 of the J. D. Wadford Farm, the said Rachael Frances Baker having inherited said farm from her father, D. J. Wadford, the said Rachael Frances Baker having married John W. Baker, and on said date was living upon said farm with her husband.

2. That prior to 1 January, 1921, P. Roy Ricks owned and was in the possession of a certain tract of land in Southampton County, Virginia, Drewryville Magisterial District, containing 217¼ acres, more or less.

3. That on 1 January, 1921, the following liens existed as valid, subsisting liens against the 217¼ acres of land, in Southampton County, Virginia, owned by P. Roy Ricks, in the following order:

(a) An indebtedness due the Federal Land Bank, of Baltimore, Md., of $3,800, dated 5 June, 1919, recorded in the office of the clerk of the Circuit Court of Southampton County, Virginia, in Mortgage Book 19, p. 256.

(b) A deed of trust securing an indebtedness to James T. Gillette, guardian, of $6,000, dated 9 June, 1919, and recorded in Deed of Trust Book No. 19, page 253.

(c) A deed of trust securing an indebtedness of J. H. Leigh for $1,200, dated 9 June, 1919, and recorded in Deed of Trust Book No. 19, p. 253.

4. That James T. Gillette, guardian, had as additional security for the $6,000 above mentioned a mortgage or deed of trust upon two other tracts of land in said State, county and magisterial district, being lots Nos. 8 and 9 of the C. P. Grizzard Home Place, containing 87 and 74 acres, respectively, the said mortgage or deed of trust having been given by D. C. Ricks and was duly recorded, the said D. C. Ricks being a brother of P. Roy Ricks.

5. That certain negotiations had been between Joshua Leigh and P. Roy Ricks, resulting in the giving of an option by P. Roy Ricks to the said Leigh for the said 217¼ acres of land.

6. That some time during the year 1920, J. W. Baker, the husband of Rachael Frances Baker, went to Southampton County, Virginia, and took from Joshua Leigh an option upon the Ricks place, upon the following terms: he paid $500 at the time of the taking of the option; was to pay $4,500 additional, making $5,000 in all, by 1 December, 1920, and was to assume the indebtedness of $11,000 upon the place.

7. This option was closed in the office of J. T. Gillette, who was an attorney, the $500 was paid and went into the hands of J. T. Gillette,

who credited the same upon the interest due him as guardian, on the $6,000 note which he held against P. Roy Ricks.

8. That in the fall of 1920 John W. Baker failed to take up the option and pay the $4,500, and forfeited the $500 previously paid.

9. Upon the failure of John W. Baker to take up the option, Joshua Leigh had no further interest in the matter.

10. When J. T. Gillette ascertained that John W. Baker had failed to take up the option, he came to North Carolina to see and did see John W. Baker and his wife, this visit being made at the instance of P. Roy Ricks and D. C. Ricks.

11. In consequence of this visit, J. T. Gillette arranged with the First National Bank of Portsmouth, Virginia, for a loan of $3,500 for John W. Baker, which was to be arranged as follows: John W. Baker and wife, Rachael Frances Baker, were to give a deed of trust upon Mrs. Baker's land in North Carolina, securing a note of $3,500; J. T. Gillette was to endorse this note as collateral to his note to the bank.

12. The price of the land was abated to $15,000. By the arrangement above set out, $4,000 was to be paid in cash, made up by the $3,500 loan and the $500 which had been previously paid and John W. Baker was to assume the mortgage indebtedness on the P. Roy Ricks land in Southampton County, Virginia.

13. In consequence of these negotiations, J. T. Gillette came to the home of John W. Baker and his wife and prepared a deed of trust to W. P. Gillette, Jr., securing a note for $3,750, payable to Jas. T. Gillette. John W. Baker and his wife, Rachael Frances Baker, signed the deed of trust and the note. J. T. Gillette returned to Virginia, and in about ten days the deed of trust and note were sent him, the probate having been taken by T. E. Powell, a justice of the peace of Nash County, now dead; the deed of trust was on 21 January, 1921, recorded in Book 219, page 317, in the office of the register of deeds of Nash County. The note was taken for $3,750, $3,500 to be used in the purchase of the Ricks land and $250 was Gillette's fee for negotiating and financing the deal.

14. Pursuant to arrangements which had been made, Jas. T. Gillette endorsed the $3,750 note of Rachael Frances Baker and her husband, John W. Baker, attached it to his note of $3,500, and sent it to Portsmouth, Virginia, and the defendant, State Bank of Portsmouth, discounted Gillette's note for $3,500 and came into the possession of the $3,750 Baker note only a few days after the note was given, and long prior to its due date.

15. The proceeds of the $3,500 note given by Jas. T. Gillette, with the $3,750 note as collateral thereto, was used by him as a payment upon the $6,000 note held by him as guardian.

16. Thereupon, P. Roy Ricks and wife executed and delivered unto John W. Baker and wife, Rachael Frances Baker, a deed of conveyance, conveying unto them as "joint owners" the 217¼ acres of land in Southampton County, Virginia, subject to the three encumbrances or liens hereinbefore set out in Finding of Fact No. 3, amounting to $11,000, the said deed was duly recorded in Deed Book 68, page 540, in the clerk's office of the Circuit Court of Southampton County, Virginia; and John W. Baker and wife, Rachael Frances Baker, moved from North Carolina to Virginia and upon said lands, and lived there for several years.

17. James T. Gillette had agreed with D. C. Ricks and P. Roy Ricks that upon the payment of the sum of $4,000, lots Nos. 8 and 9 of the C. P. Grizzard Home Place, which had been mortgaged to secure his note as guardian for $6,000 would be released, and thereupon, on 30 April, 1921, James T. Gillette as trustee and as guardian, executed and delivered unto D. C. Ricks a deed of release by which lots Nos. 8 and 9 of the C. P. Grizzard Home Place were released from the deed of trust securing the $6,000 note, the said release having been duly recorded in Release Deed Book No. 1, page 524.

18. There is no evidence as to whether or not John W. Baker and wife, Rachael Frances Baker, were cognizant of or knew anything about the agreement between James T. Gillette and D. C. Ricks as to the release by Gillette of lots Nos. 8 and 9 of the Grizzard Farm and the referee, therefore, is unable to find as a fact that John W. Baker and Rachael Frances Baker were cognizant of the agreement to and the subsequent release of these two tracts of land, and the referee finds that Rachael Frances Baker was not cognizant of the agreement.

19. There is no evidence as to the value of lots Nos. 8 and 9 of the Grizzard Home Place, the referee, therefore, is unable to find what these two tracts of land were worth at the time of the execution of the release above mentioned.

20. John W. Baker defaulted in the payment of the interest and taxes upon the lands in Southampton County, Virginia, and James T. Gillette in order to protect himself, was compelled to pay the interest and taxes as they accrued, with the exception of $268.72, which was paid to him by John W. Baker.

21. James T. Gillette was compelled to and did pay to the sheriff of Nash County $182.75 on 8 February, 1924, being the taxes upon the Baker land in Nash County.

22. Baker having defaulted, the lands in Southampton County, Virginia, were finally sold by the Federal Land Bank of Baltimore, and bid in by one Peter Thomas for $7,000, Thomas now being in possession thereof. The evidence is that this purchase has not yet been consummated.

23. That on the day that Rachael Frances Baker executed the note of $3,750 and the deed of trust to W. P. Gillette, Jr., securing the same, and for some time prior thereto, she was mentally incapable of entering into a contract so as to bind her separate estate.

24. That neither James T. Gillette nor W. P. Gillette, Jr., knew of the mental incapacity of Rachael Frances Baker on the date that she executed the note and mortgage.

25. That the State Bank of Portsmouth, Va., had no knowledge of the want of capacity of Rachael Frances Baker at the time she executed the note of $3,750, and the deed of trust securing the same; that it took the said note as collateral to the $3,500 note of James T. Gillette in the following circumstances:

1. The instrument was complete and regular upon its face.

2. The bank became the holder of it before it was overdue and without notice of previous dishonor.

3. The bank took it for good faith and value.

4. That at the time the bank took the note it had no notice of any infirmities in the instrument or defect in the title of the person negotiating it.

26. That when James T. Gillette took the note of $3,750, and the deed of trust securing the same, he had no intention of driving an unconscionable bargain with Rachael Frances Baker or her husband, John W. Baker, and did not attempt to take advantage of either one of them.

27. There is no evidence before the referee as to the value of the 217¼ acres of land in Southampton County, Virginia, at the time of the conveyance of the same to John W. Baker and wife, Rachael Frances Baker by P. Roy Ricks, and the referee therefore is unable to find as a fact what was the value of the land at that time and makes no finding with reference thereto, there being no evidence before him from which he can make any finding.

28. Upon admissions made before the referee, the referee finds that Rachael Frances Baker owns no property other than her interest in the farm in Nash County, being lot No. 3 of the J. D. Wadford land, and that her husband, John W. Baker, owns no property whatsoever.

29. That some time between the date upon which the note for $3,750 and the deed of trust securing the same were given, and the institution of this action, Rachael Frances Baker was duly adjudged incompetent by the Superior Court of Nash County, a court having jurisdiction, and the plaintiff, A. D. Wadford, has been duly appointed guardian of her estate and has qualified as such, and in such capacity has instituted this action.

30. Rachael Frances Baker has received no such valuable consideration for the $3,750 note signed by her and her husband and the deed of

trust securing the same as is necessary to bind the estate of a person *non compos mentis,* and no property of any appreciable value has ever passed to her or been paid to her estate in exchange for the said note. The deed from P. Roy Ricks and wife for the 217¼ acres of land created an estate by the entireties on John W. Baker and his wife, Rachael Frances Baker, and was subject to encumbrance amounting to $11,000; whatever interest Rachael Frances Baker may have acquired in this land was of small money value and in no wise equal to $3,750, as she was not a party to, knew nothing of and received no benefits from the release given by J. T. Gillette as trustee and guardian, to D. C. Ricks for lots Nos. 8 and 9 of the C. P. Grizzard home place, her rights and interests are in no wise affected by such release.

From the foregoing findings of fact the referee arrives at the following conclusions of law:

1. That the bringing of this action by A. D. Wadford, guardian of Rachael Frances Baker, is a repudiation by him for her of the note for $3,750 to J. T. Gillette, and the deed of trust conveying her lands in Nash County, North Carolina, being lot No. 3 of the J. D. Wadford land, to W. P. Gillette, Jr., securing said note.

2. That the paper-writing in the form of a note in the sum of $3,750, signed by John W. Baker and wife, Rachael Frances Baker, and the paper-writing in the form of a deed of trust to W. P. Gillette, Jr., securing said note, in so far as they affect the property of Rachael Frances Baker, should be canceled.

3. The rights of the holder of the note to proceed against John W. Baker cannot be passed upon, as he is not a party to this action.

4. As the payment by J. T. Gillette of $182.75 on 8 February, 1924, to the sheriff of Nash County, North Carolina, for taxes then due upon the lands of Rachael Frances Baker in Nash County, being lot No. 3 of the J. D. Wadford land inured to the benefit of the said Rachael Frances Baker, J. T. Gillette is entitled to recover from A. D. Wadford, guardian of Rachael Frances Baker, the sum of $182.75, with interest from 8 February, 1924."

From the foregoing judgment the defendants appeal.

The defendants agreed to waive $250 of said indebtedness, so that the amount now in controversy is $3,500.

E. B. Grantham and Finch & Vaughan for plaintiff.
Spruill & Spruill and Cooley & Bone for defendant.

BROGDEN, J. Two questions of law are presented for determination:

1. What is the legal status of a negotiable note executed by an insane person and secured by deed of trust upon the property of such person, when the payee in the note and the trustee in the deed of trust had no

knowledge of the mental incapacity of the maker of said note or of the grantor in said deed of trust, and when the entire transaction was in good faith and free from fraud?

2. Is such a note enforceable by a holder in due course?

The evidence supporting the findings of fact by the referee is not included in the record, but the trial judge approved the findings of fact and conclusions of law contained in the referee's report. Therefore, the findings of fact are not reviewable in this Court if there was evidence to support them, and as the evidence is not included in the case on appeal, it must be presumed that the evidence supported the findings. *Miller v. Groome,* 109 N. C., 148; *Thompson v. Smith,* 156 N. C., 345; *Dumas v. Morrison,* 175 N. C., 431; *Caldwell v. Robinson,* 179 N. C., 518; *Hardy v. Thornton,* 192 N. C., 296.

The principle of law governing contracts of insane persons may be stated substantially as follows:

1. The contract of a person not judicially declared to be insane is voidable and not void. If the insanity has been formally adjudicated, subsequent contracts made by such person are void.

2. A party dealing with an insane person, knowing his mental condition, is deemed to perpetrate a fraud upon such insane person, and upon his rights.

3. When a contract with an insane person is executed and completed, and is fair and made in good faith, without notice of mental incapacity, and the parties cannot again be put *in statu quo,* such contract is valid and enforceable.

4. However, when mental incapacity is shown, the burden is so far shifted that the agreement will be set aside unless the party claiming under the contract, by proper proof, establishes the fact that he was ignorant of the mental incapacity, and had no notice thereof which would put a reasonably prudent person upon inquiry, and that no unfair advantage was taken, and that the insane person is not able to restore the consideration or to make adequate compensation therefor. *Carr v. Holliday,* 21 N. C., 344; *Odom v. Riddick,* 104 N. C., 515; *Creekmore v. Baxter,* 121 N. C., 31; *Sprinkle v. Wellborn,* 140 N. C., 163; *Beeson v. Smith,* 149 N. C., 142; *West v. R. R.,* 151 N. C., 231; *Godwin v. Parker,* 152 N. C., 672; *Ipock v. R. R,* 158 N. C., 445; *Craddock v. Brinkley,* 177 N. C., 125.

The referee, in his 30th finding of fact, declared that "Rachael Frances Baker has received no such valuable consideration for the $3,750 note signed by her and her husband and the deed of trust securing the same as is necessary to bind the estate of a person *non compos mentis,* and no property of any appreciable value has ever passed to her, or been paid to her estate in exchange for the said note."

If this statement of the referee should be construed as a finding of fact, exclusively, then it would be necessary to affirm the judgment as such finding has been approved by the judge, and is therefore not reviewable; but as all the facts are set out in the referee's report, this finding, upon fair construction, would seem to be a conclusion of law. So that it becomes necessary to ascertain whether or not, under the facts as found by the referee, Rachael Frances Baker actually received a fair consideration for the note executed by her and secured by deed of trust upon her property in Nash County.

What, then, was the consideration that Rachael Frances Baker received from the transaction? In the first place, she received an estate by entirety under and by virtue of the deed for the Virginia land, executed by P. Roy Ricks and wife. She and her husband moved upon this land and lived thereupon for several years, enjoying the rents and profits of the land. The brief for plaintiff states: "It will be noted the deed to the Ricks land in Virginia was made to J. W. Baker and his wife, plaintiff's ward, as tenants by entireties, but only for a remainder interest, said deed reciting on its face that said land was subject to a first, second, and third mortgage, and attempted to bind grantees to pay off said three mortgages as a part of the considerations for said conveyance." Hence it appears that the deed to plaintiffs provided that the plaintiffs, as grantees therein, should assume and pay off the outstanding mortgage indebtedness existing on the Virginia farm. Included in this outstanding indebtedness was a note of $6,000, payable to the defendant James T. Gillette, guardian, and secured by deed of trust on said property. The proceeds of the note made by John W. Baker and his wife, Rachael Frances Baker, and secured by a deed of trust on her land in Nash County, was applied to this $6,000 lien. Rachael Frances Baker therefore received the full consideration for this credit for the reason that, having assumed the indebtedness on the Virginia farm in the event of a sale of such farm at a sum less than the outstanding liens, then John W. Baker and Rachael Frances Baker would have been liable for the deficiency and the reduction of the $6,000 liability by applying the $3,500 diminished to that extent, the contingent liability of Rachael Frances Baker. The rule of law applicable is thus stated in *Baber v. Hanie,* 163 N. C., 591, as follows: "The doctrine of equity is that when the grantee in a deed assumes the payment of the mortgage debt, he is to be regarded as the principal debtor, and the mortgagor occupies the position of a surety, as between themselves, and the mortgagee is permitted to resort to the grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises, by the equitable rule that the creditor is entitled to the benefit of all the collateral securities which his debtor has obtained to reinforce the principal obligation, though this right is strictly an equitable one, and its exercise at law has been refused." Jones on Mortgages, 7 ed., vol. 3, sec. 1713; *Bank v. Watson,* 187 N. C., 107; *Parlier v. Miller,* 186 N. C., 501.

We are therefore of the opinion that Rachael Frances Baker received such consideration for the note in controversy as the law contemplates in order to constitute an enforceable contract.

The referee finds that neither John W. Baker nor Rachael Frances Baker has any property except the Nash County property of Rachael Frances Baker. It is therefore apparent that Rachael Frances Baker cannot restore the consideration or place the defendants *in statu quo.* Hence, upon the entire record, it appears that Rachael Frances Baker received full consideration for the note in controversy; that she cannot restore the consideration or place the parties *in statu quo;* that the contract was fully executed, and that there was an entire lack of knowledge of her mental condition or of such facts as to put a reasonably prudent person upon inquiry. Moreover, it appears that there was no fraud or unfair advantage, but the whole transaction was begun and completed in good faith and in full accord with the principles of fair dealing.

The referee finds that the defendant, State Bank of Portsmouth, Virginia, took the note of Rachael Frances Baker as collateral to the $3,500 note of the defendant James T. Gillette under such conditions as to constitute said bank a holder in due course. C. S., 3033.

The same principles that control contracts of insane persons apply to negotiable instruments. *Bank v. Moore,* 78 Pa. St., 407, cited with approval in *Odom v. Riddick,* 104 N. C., 522; *Hostler v. Beard,* 54 Ohio St., 398, cited with approval in *Ipock v. R. R.,* 158 N. C., 449.

For the reasons given, the judgment is

Reversed.

H. C. RIPPLE, TRUSTEE IN BANKRUPTCY OF GEORGE H. WILLARD MOTOR COMPANY, v. MORTGAGE AND ACCEPTANCE CORPORATION.

(Filed 23 March, 1927.)

1. **Usury—Actions—Parties—Bankruptcy—Trustee.**

A right of action to recover the penalty for a usury charge is in the nature of an action for debt, and is a wrongful detention of, or injury to the estate of the bankrupt which passes to his trustee in bankruptcy. C. S., 2306.

2. **Usury—Contracts—Interpretation—Substance—Statutes.**

Where a finance corporation loans money for the purchase of automobiles sold in this State to be paid for herein at a greater rate of interest than six per cent, the transaction is an usurious one coming within the inhibition of our statute and the penalty it imposes, though the contract is couched in the language of bargain and sale in order to evade our usury law. C. S., 2305.

3. Same—Place of Payment.

Where in fact a contract for the payment of usurious interest in violation of C. S., 2305, was made and payable in this State, the fact that it appeared from the face of the contract that it was payable in another state, does not relieve it of its usurious charge of interest contrary to the statute of this State.

APPEAL by defendant from *Oglesby, J.*, at September Term, 1926, of FORSYTH. Affirmed.

Action by plaintiff trustee in bankruptcy to recover of defendant twice the amount paid to defendant by the bankrupt prior to its adjudication, upon the allegation that said amount was usury.

The action was begun and tried in Forsyth County Court, before Parker, J., and a jury. The issue submitted to the jury at said trial were answered as follows:

"1. Were the contracts sued upon executed in the State of Maryland, as alleged in the answer? Answer: 'No.'

"2. Were the contracts to be performed in the State of Maryland, as alleged in the answer? Answer: 'No.'

"3. Did the defendant own and sell the automobiles to the George H. Willard Motor Company, and take conditional sales contracts therefor, as alleged in the answer? Answer: 'No.'

"4. Did the defendant knowingly take, receive, reserve, or charge the George H. Willard Motor Company a greater rate of interest than six per cent per annum, as alleged in the complaint? Answer: 'Yes.'

"5. What amount of penalty, if any, is the plaintiff entitled to recover of the defendant for usurious interest paid? Answer: '$2,290.80.'"

From judgment on the verdict, defendant appealed to the Superior Court of Forsyth County. Upon said appeal, its assignments of error, based upon exceptions taken during the trial in the county court, were not sustained.

From judgment of the Superior Court affirming the judgment of the county court, defendant appealed to the Supreme Court. Upon its appeal to this Court, defendant assigns as error, first, the refusal of the judge of the Superior Court to sustain its assignments of error, based upon exceptions taken during the trial in the county court, and, second, the signing of the judgment affirming the judgment of the county court.

R. M. Weaver and Hastings & Booe for plaintiff.
W. T. Wilson, Edward Duffy, and A. B. Justice for defendant.

CONNOR, J. Interest is the compensation allowed by law, or fixed by the parties for the use, or forbearance, or detention of money. Black's Law Dictionary.

The legal rate of interest in North Carolina is six per cent per annum for such time as interest may accrue, and no more. C. S., 2305. An agreement by the parties for the payment of interest in excess of the legal rate, made in this State and to be performed therein, is unlawful; such an agreement is in violation of the statute and is contrary to the public policy of this State, as declared by its General Assembly. No cause of action founded upon such an agreement can be maintained in the courts of this State. The agreement is void; there can be no recovery in any court in North Carolina upon a promise or agreement by a borrower to pay as compensation for the use of money a sum in excess of interest at the legal rate, where such agreement is made within this State, and both parties contemplate that it shall be performed therein. The law in this respect is well settled, and generally understood by all persons, firms, or corporations doing business in North Carolina. From time to time, however, our courts are called upon to determine whether or not the law has been successfully evaded by those who are not content to lend money in North Carolina at the legal rate of interest. Attempts to evade the law have not been generally successful. Our courts do not hesitate to look beneath the forms of transactions alleged to be usurious in order to determine whether or not such transactions are in truth and in reality usurious. In *Bank v. Wysong,* 177 N. C., 380, *Justice Walker,* speaking of a transaction alleged to be usurious, says: "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguises, and decided according to its substance, and its tendency and effect, when the purpose and intent of the lender is unmistakable. This is the correct rule." See *Lumber Co. v. Trust Co.,* 179 N. C., 211; *Monk v. Goldstein,* 172 N. C., 516; *Riley v. Sears,* 154 N. C., 509; *Burwell v. Burgwyn,* 100 N. C., 389. Where a transaction is in reality a loan of money, whatever may be its form, and the lender charges for the use of his money a sum in excess of interest at the legal rate, by whatever name the charge may be called, the transaction will be held to be usurious. The law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is. If this were not so, the usury laws of the State would easily be evaded by lenders of money who would exact from borrowers with impunity compensation for money loaned in excess of interest at the legal rate.

In North Carolina the penalty, as prescribed by statute, for taking, receiving, reserving, or charging for the use of money a sum in excess of interest at the legal rate is forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid. The forfeiture will be enforced against the usurer, when he seeks to recover upon the usurious contract or transaction. His debt will be stripped of all its interest-bearing quality, and he will be permitted to recover only the principal sum loaned. If a sum in excess of interest at the legal rate has not only been charged by the lender, but has also been paid by the borrower for the use of money, then the person, or his legal representative, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt. C. S., 2306. *Sloan v. Ins. Co.,* 189 N. C., 690; *Waters v. Garris,* 188 N. C., 305.

This action is for the recovery of twice the amount paid by the George H. Willard Motor Company, a corporation organized under the laws of the State of North Carolina, with its principal place of business at Winston-Salem, N. C., to defendant, a corporation organized under the laws of the State of Delaware, with its principal place of business in the city of Baltimore, in the State of Maryland, as compensation for the use of money, the amount so paid being in excess of interest at the legal rate upon the amounts loaned. The transactions upon which the several amounts were paid extended from 23 June, 1924, to 23 January, 1925. The aggregate of the amounts so paid between said dates is $1,145.40. The George H. Willard Motor Company was adjudged a bankrupt on 6 March, 1925, and plaintiff, a resident of Forsyth County, has been duly appointed a trustee in bankruptcy for said company. This action was begun on 22 April, 1925.

Defendant's first assignment of error, upon its appeal to the Superior Court, was based upon its exception to the refusal of the county court to sustain its motion made in said court, before the jury was empaneled, that the action be dismissed on the ground that plaintiff, trustee in bankruptcy, cannot maintain the action, it being for the recovery of a penalty prescribed by statute. Defendant contends that this penalty can be recovered only by the person or corporation by whom usury has been paid, and that the right to recover same does not pass to or vest in the trustee in bankruptcy of such person or corporation. Upon its appeal to this Court, defendant assigns as error the refusal of the judge presiding in the Superior Court to sustain this assignment of error.

Upon the facts alleged in the complaint, the George H. Willard Motor Company, by the express provisions of the statute—C. S., 2306—at the date of its adjudication as a bankrupt, had a right of action, in the nature of an action for debt, against the defendant for the recovery of the amount demanded in the complaint. This right of action, together with all other rights of action arising upon contract, or from the unlawful taking or detention of, or injury to the property of the bankrupt, passed to and vested in the trustee in bankruptcy, upon his appointment and qualification as such trustee. National Bankruptcy Act, sec. 70. The cause of action alleged in the complaint is founded upon a statute; the statute, however, defines the action as one in the nature of an action for debt. It is for the recovery of twice the amount unlawfully taken by defendant from the bankrupt. The amount so taken is wrongfully detained by defendant, to the injury of the estate of the bankrupt. The right to recover twice this amount, by operation of law, has vested in the plaintiff, who as trustee in bankruptcy may maintain the action.

In Black on Bankruptcy, the author says: "A right of action under a state statute to recover back usurious interest paid (or double the amount of it, or a penalty for exacting it, as the case may be) will vest in the trustee in bankruptcy of the borrower, since the injury done by the usurer is an injury to the property or estate of the borrower, and not a personal tort." Sec. 344.

This statement of the law, taken from the text, is supported by authorities cited in the note. The identical question presented by defendant's assignment of error was decided in *Reed v. American-German National Bank,* 155 Fed., 233. It is there held that a trustee in bankruptcy may maintain an action to recover usurious interest paid by the bankrupt. In *Lasater v. First National Bank,* 96 Tex., 345, 72 S. W., 1057, it is held that a right of action for the recovery of a statutory penalty for taking usurious interest passes to the trustee in bankruptcy. In the opinion of the Court in that case, it is said that "the weight of authority sustains the proposition that when a cause of action as that asserted has accrued, it will, upon the bankruptcy of the owner, pass to the trustee in bankruptcy." See, also, Collier on Bankruptcy, 1925 ed., p. 1724.

In *Cleland v. Anderson,* 66 Neb., 252, 92 N. W., 306, 5 L. R. A. (N. S.), 136, it was held by the Supreme Court of Nebraska that a right of action, founded upon a statute of that state, for the recovery of damages resulting from a conspiracy to injure the bankrupt's business, or property, passed to his trustee in bankruptcy, under the provisions of the National Bankruptcy Act. In the instant case, the right of action, founded upon the statute, having accrued at the date of the adjudication, passed to the plaintiff, who as trustee in bankruptcy, may maintain the action, which is in the nature of action for debt. The amount recovered becomes an asset in the hands of the trustee, to be administered by him as property belonging to the estate of the bankrupt. There was no error in the refusal of the judge presiding in the Superior Court to sustain defendant's first assignment of error upon its appeal from the judgment of the county court.

In answer to the third and fourth issues, submitted at the trial in the county court, the jury has found that defendant did not own and sell the automobiles described in the conditional sales contracts offered in evidence; that the consideration for the notes executed by the said motor company, payable to the order of defendant, and thereafter paid by said company to defendant, was money loaned; and that defendant knowingly took, received, reserved, and charged said motor company, as compensation for money loaned, sums in excess of interest thereon at the legal rate.

We find no error in the refusal of the judge of the Superior Court to sustain defendant's assignments of error with respect to these issues. All the evidence was to the effect that the George H. Willard Motor Company purchased the automobiles from the manufacturer, who shipped the same from the factory to the motor company, at Winston-Salem, N. C., upon bills of lading, with drafts attached for the purchase price of the said automobiles; that these drafts were paid by the motor company by checks drawn on its bank account, and that upon payment of said drafts, the said automobiles were delivered by the railroad company to the motor company. The title to said automobiles never passed to or vested in defendant, either actually or constructively. The conditional sales contracts, in which defendant is described as vendor and the motor company as purchaser of said automobiles, were manifestly used for the purpose of concealing the real nature of these transactions. These transactions involved loans of money by defendant to the motor company; they were not sales of automobiles by defendant to the motor company.

Defendant admits that upon these various transactions, extending from 23 June, 1924, to 23 January, 1925, the motor company paid to it sums of money aggregating $1,145.40. These sums were called "finance charges"; they were in fact charges for the use of money, and exceeded interest at the legal rate upon the amounts loaned. The transactions were clearly usurious; they were admittedly entered into in North Carolina, and not in the State of Maryland.

Defendant, at the trial in the county court, relied chiefly upon its contention that the contracts upon which the motor company to it, as compensation for the use of money, sums in excess of interest at the legal rate, were to be performed in the State of Maryland, and not in the State of North Carolina, and that therefore there could be no recovery in this action.

Plaintiff contended that although the notes which were executed by the motor company were, upon their face, payable in the city of Baltimore, it was contemplated by both defendant and said company that they were to be paid in North Carolina.

After stating the contentions of both plaintiff and defendant, with respect to the second issue, the court instructed the jury as follows:

"Now, gentlemen of the jury, if the place of payment was specified as in the State of Maryland, for the purpose of avoiding the usury laws of North Carolina, and if it were a scheme or method to avoid the usury laws of North Carolina, and that was the reason for the place of payment being provided in Maryland, then your answer to the second issue would be 'No'; that they were not to be performed in Maryland, because if providing the place of payment as Maryland was a scheme to evade and whip around the usury laws of North Carolina, and was not done in good faith, then the place of payment, so far as the law is concerned, would not be in Maryland."

In *Meroney v. Building and Loan Asso.*, 112 N. C., 842, it was said by this Court that "if it is true, as plaintiff alleges, that the contract set out in the complaint was made payable in the State of Georgia to avoid the usury laws of this State, that contract will be adjudged to be usurious, whatever may be the law of that State." There was no error in the foregoing instruction, and defendant's exception thereto was properly not sustained upon its appeal to the Superior Court.

We find no error in the trial of this action in the county court. Upon the facts as found by the jury, plaintiff is entitled to recover of defendant twice the amount paid by the George H. Willard Motor Company to the defendant for the use of money loaned, said amount being in excess of interest at the legal rate upon the amounts loaned. The judgment is

Affirmed.

Z. V. RAWLS v. E. S. LUPTON.

(Filed 23 March, 1927.)

1. **Appeal and Error—Presumptions — Burden of Proof — Evidence—Questions and Answers—Unanswered Questions.**

The presumptions are in favor of the correctness of the rulings of law of the Superior Court, with the burden upon appellant to show error therein, and upon the refusal of the trial judge to admit in evidence answers to questions asked of the witness, it must be made to appear what the answers of the witness would have been so that the Supreme Court may pass upon its relevancy and materiality.

2. **Appeal and Error—Instructions—Exceptions — Statutes — Rules of Court.**

Exceptions to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must be made to appear in some appropriate and recognized way that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. C. S., 643.

3. **Appeal and Error—Questions of Law or Legal Inference—Constitutional Law.**

Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Const. of North Carolina, Art. IV, sec. 8.

APPEAL by plaintiff from *Sinclair, J.*, and a jury, at the Fall Term, 1926, of PAMLICO. No error.

D. L. Ward, Guion & Guion, and L. I. Moore for plaintiff.
No counsel for defendant.

CLARKSON, J. This is an action for assault and battery, brought by plaintiff against defendant. The plaintiff alleges that the assault and battery was willful, wanton, and malicious, and in his prayer for judgment demands punitive as well as actual damages.

The issues submitted to the jury, and their answers thereto, are as follows:

"1. Did the defendant wrongfully and unlawfully assault and injure the plaintiff, as alleged in his complaint? Answer: 'Yes.'

"2. Was said assault willful, wanton, and malicious, as alleged in the complaint? Answer: 'No.'

"3. What damages, if any, is plaintiff entitled to recover from defendant? Answer: '$600, less $140 doctor bill—$460.' "

The plaintiff testified as to the occurrence, in part: "After he (speaking of defendant) asked me about the letter, he made the statement, similar to this, if not the exact words, he said, 'Don't you think you have bedeviled me enough in the last four years?' I said, 'Sheriff, the courts have sustained every matter I have had the last four years, and I don't see why you have taken this attitude.' I said, 'But for the fact that I agreed to a partial compromise of the money you owe the county, you would probably be in the penitentiary today.' He then jumped toward me like an angry bull, giving me a severe blow, struck the base of my nose between the eye and nose. I don't know how long I was unconscious, but the next I remember was standing in the hallway of the register of deeds' office; I was knocked down from the blow." Plaintiff's nose was broken from the severity of the assault and battery.

Defendant contended that he struck him through sudden anger on account of sudden provocation.

There are numerous exceptions and assignments of error made by plaintiff as to the refusal of the court below to admit certain evidence. There is nothing in the record to indicate or disclose what the answers would have been to the question propounded the witnesses. We cannot assume that they would have been favorable to plaintiff. The burden is on the appellant to show error; therefore, the record must set forth and disclose the materiality and competency of the evidence. The record is silent. A long line of unbroken authorities, civil and criminal, support the position here taken. *Snyder v. Ashboro,* 182 N. C., 708; *S. v. Jestes,* 185 N. C., 735; *Layton v. Godwin,* 186 N. C., 312; *Hosiery Co. v. Express Co., ibid.,* 556; *Barbee v. Davis,* 187 N. C., 78, 85; *S. v. Ashburn, ibid.,* 717; *Smith v. Myers,* 188 N. C., 551; *S. v. Collins,* 189 N. C., 15; *Newbern v. Hinton,* 190 N. C., 108; *Hooper v. Trust Co., ibid.,* 423; *Pace v. McAden,* 191 N. C., 137.

C. S., 643, is as follows: "The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, *if there be an exception thereto,* and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, *and stating separately, in articles numbered, the errors alleged.* A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved." (Italics ours.)

In *Gwaltney v. Assurance Society,* 132 N. C., p. 930 (rehearing denied, 134 N. C., 552), construing this statute, this Court said: "Each exception to the charge is required by the statute (The Code, sec. 550, now C. S., 643), to be stated separately in articles 'numbered,' and no exception should contain more than one proposition, else it is not 'specific,' and must be disregarded."

Errors must be specifically assigned. An "unpointed, broadside" exception to the "charge as given" will not be considered. *McKinnon v. Morrison,* 104 N. C., 354. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court. *S. v. Webster,* 121 N. C., 586; *Pierce v. R. R.,* 124 N. C., 83; *Mitchell v. Baker,* 129 N. C., 63; *Sigman v. R. R.,* 135 N. C., 181; *Davis v. Keen,* 142 N. C., 496; *Streator v. Streator,* 145 N. C., 337; *Jackson v. Williams,* 152 N. C., 203; *Lumber Co. v. Moffitt,* 157 N. C., 568; *Sigmon v. Shell,* 165 N. C., 582; *Barefoot v. Lee,* 168 N. C., 89;

Nance v. Tel. Co., 177 N. C., 313; *Bank v. Pack,* 178 N. C., 388; *Lanier v. Pullman Co.,* 180 N. C., 406; *Hale v. Rocky Mount Mills,* 186 N. C., 49.

Under C. S., 643, *supra,* and the decisions of this Court, the appellant must make "specific" exceptions to the charge of the court below, stating separately in articles numbered the errors alleged.

For example: Suppose the court below instructed or charged the jury as follows: ("The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one, by the show of violence, has the right to put another in fear and thereby force him to leave a place where he has the right to be.") To the foregoing charge in brackets or quotation, as the case may be, the plaintiff or defendant, as the case may be, excepted.

Exception No. 1.

Battery is ("Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent.") To the foregoing charge in brackets or quotation, plaintiff or defendant, as the case may be, excepted.

Exception No. 2.

("The actual offer to use force to the injury of another is assault; the use of it is battery; hence, the two terms are commonly combined in the term 'assault and battery.'") To the foregoing charge in brackets or quotation the plaintiff or defendant, as the case may be, excepted.

Exception No. 3.

Of course, it goes without saying that appellant shall also set out in the assignments of error any exceptions taken during the trial in apt time to the admission or exclusion of testimony, or to rulings of the court on other matters. Those exceptions relating to the exclusion or admission of testimony, when brought forward into the assignments of error, shall reiterate, verbatim, such testimony. Exceptions to the charge can, if desired, be lettered a, b, c, etc.

ASSIGNMENTS OF ERROR

1. The court erred in charging or instructing the jury as follows: "The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one, by the show of violence, has the right to put another in fear, and thereby force him to leave a place where he has the right to be," as shown by plaintiff or defendant's exception No. 1. (R. p. .....)

In the present case, the statute has not been complied with. We do not mean to say that litigants cannot, by consent, eliminate so much of the charge as they do not think necessary for a decision of the legal matters in dispute. Continuity of the charge is necessary with the "specific" exceptions. Anything else is unfair to the trial judge—to have his charge cut up in piecemeal and disconnected. In the assignments of error, so much of the charge as is excepted to and numbered with reference to the page of the record, is necessary. We continue to point a way which it is hoped will be kindly considered and substantially followed. We have frequently long records to read and re-read, and unless the statute is followed, and *seriatim* exceptions to the charge are made and numbered, with assignments of error numbered, and giving record page, it is tedious and burdensome to "fish out" of the charge the numerous assignments of error. "In this way the scope of our inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of." *Byrd v. Southerland,* 186 N. C., p. 385.

The rules of practice, both of the Supreme and Superior Courts, have been carefully reëxamined and all modifications incorporated and are printed in 192 N. C., p. 837, with annotations.

Notwithstanding that the statute has not been complied with yet, we have examined the charge, and, as a whole, we can find no reversible or prejudicial error.

In plaintiff's brief it is said: "This matter thus far has been a great miscarriage of justice." The facts were passed upon by the jury in the court below. We have no power here except to "review upon appeal any decision of the courts below, *upon any matter of law or legal inference.*" Const. of N. C., part Art. IV, sec. 8.

On the record, we can find

No error.

TOWN OF CLINTON, AND HENRY VANN, MAYOR, AND J. A. POWELL, F. L. TURLINGTON, D. L. BONEY, AND F. B. JOHNSON, COMMISSIONERS OF SAID TOWN OF CLINTON, v. STANDARD OIL COMPANY.

(Filed 23 March, 1927.)

Municipal Corporations—Cities and Towns—Fire Districts—Ordinances—Discrimination—Constitutional Law—Monopolies.

Ordinances for the erection and maintenance of filling stations within a prescribed fire limit of a town must be of uniform application and indiscriminatory, and where there are several such stations conducting business within such fire limits, an ordinance prohibiting the erecting of another filling station of the same kind as existing therein is void, as tending to create a monopoly forbidden by our State Constitution, Art I, sec. 31; Const. 1776, Declaration of Rights, sec. 23.

Appeal by plaintiffs from *Grady, J.,* at chambers in Clinton, 20 November, 1926. From Sampson. Affirmed.

Faircloth & Fisher and Butler & Herring for plaintiffs.
Graham & Grady and Pou & Pou for defendant.

Clarkson, J. This is an action brought by plaintiffs against defendant, seeking injunctive relief and praying that a permanent restraining order be granted enjoining the defendant from erecting and operating a filling station for storing and retailing kerosene oil, gasoline and oils, within the fire district or fire limits of the town of Clinton, contrary to an ordinance of the town of Clinton.

The sole question involved is the validity of an ordinance of the town of Clinton, N. C., adopted 1 August, 1925, as follows:

"Resolved, that no more filling stations for storing and retailing kerosene oil, gasoline and oil be permitted to be erected and maintained within the fire district of the town of Clinton heretofore established and described."

A violation of the ordinance is made punishable by fine, not exceeding $50, or imprisonment according to law (which could not exceed 30 days), in the discretion of the mayor.

It appears from the findings of fact by the court below that there are *now six places inside the fire district or fire limits where gasoline is sold.*

"This Court has held that the business of dealing in gasoline and oil is legitimate business in municipalities, and not a nuisance *per se,* so all persons have the right to engage in this business upon equal terms and conditions." *Bizzell v. Goldsboro,* 192 N. C., p. 355. *Hanes v. Carolina Cadillac Co.,* 176 N. C., 351; *Sherman v. Levingston,* 128 N. Y. Sup., 581; *Weaver v. Palmer Bros. Co.,* 46 Sup. Court. Rep., p. 320, decided 8 March, 1926.

Blashfield Cyc. Automobile Law (1927), vol. 3, p. 2675, citing the *Hanes case, supra,* says: "The business of conducting an automobile garage, or a supply station for automobiles, is not generally regarded by the courts as a nuisance *per se,* but, on the contrary, is considered a legitimate and necessary industry. One Court has said that public garages are absolutely necessary to the progress of the community, and that each member must suffer the incidental damage and liability to danger which arises from their nonnegligent use."

Plaintiffs argue that the fire district ordinances prescribe the limits of the district and prohibit further *erection* or repair of any building within these limits unless of brick, etc., without a word as to use and operation of wood or frame buildings already within said district. Is the fire district ordinance for this reason void? If not, is the ordinance in question void? Surely, it is the policy under such fire district ordinances, that as wood and frame buildings are destroyed or removed, they must be replaced by fireproof buildings, and as filling and storage stations already in the district pass out, they cannot return. Is not the principle the same in both cases? It is a bad rule that will not work both ways. The vice of plaintiffs' contention is patent. The fire district ordinances regulate. All who *build* or *repair* must do so usually out of certain fireproof material, and all come under the regulations. No discrimination or favoritism. These regulations will apply to defendant if it builds in the limits. The fire limit regulations are sane and sensible fire preventions, and within the police power, and a great protection to the public. C. S., Municipal Corporations, Art. 11, mentions them: "Regulation of Buildings." The present ordinance does not regulate, but keeps alive the six gasoline places inside the fire limits where gasoline is sold, and prohibits defendant from carrying on a like legitimate business in the same limits. It discriminates against defendant and gives a monopoly to those now carrying on the business in the district. It is no regulation; it is a prohibition.

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessing of liberty." Const. N. C. (1868), Art. I, sec. 29. Const. 1776, Decl. Rights, sec. 21. "Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed." Const. N. C., 1868, Art. I, sec. 31; Const. 1776, Decl. Rights, sec. 23.

In *Tugman v. City of Chicago,* 78 Ill. Reports, p. 409, the Court, speaking to the subject, says: "If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and, for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate. The fact that certain persons were engaged in the business within the district designated in the ordinance at the time of its adoption gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later period. . . . A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation." *City of Lake View v. Tate,* 130 Ill., p. 247; *People v. Village of Oak Park,* 266 Ill., p. 365; *Billings v. Cook,* 35 Mont., p. 95; *May v. People,* 7 Colo. App., 157, 27 Pac. Rep., 1010.

In *Crowley v. West,* 47 Law Rep. (63 La. Ann., 526), at p. 655, the Court, speaking to the question, said: "We have, then, a case in which it appears that a person engaged in a business which is conceded to be lawful, in which four other persons or firms are engaged, in the same town, and which, so far as the record discloses, is conducted properly and inoffensively, is nevertheless, by the operation of a municipal ordinance, arrested and fined because he has failed to establish his said business in part of the town remote from the business center, rather than at the place which he considers most advantageous; and it further appears that the other four persons or firms engaged in the same business are not to be affected by the ordinance, but are to be permitted to conduct their business where they please, and that it naturally pleases them to remain in the central part of the town, from which the defendant is to be permanently excluded. The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly in perpetuity of the livery-stable business in Crowley, cannot be seriously entertained," citing numerous authorities.

The principle is well settled that ordinances must be uniform, fair, and impartial in their operation. They must be reasonable and not arbitrary. There can be no discrimination against those of the same class. The regulation must apply to all of a class. An ordinance that grants rights—the enjoyment must be to all, upon the same terms and conditions. An ordinance cannot penalize one and for the same act, done under similar circumstances, impose no penalty. No ordinance is enforceable in matters of this kind, a lawful business, that does not make a general or uniform rule of equal rights to all and applicable to all alike—then there can be no special privilege or favoritism. The right of individuals to engage in a lawful calling and use their property for lawful purposes is guaranteed to them. *Barger v. Smith,* 156 N. C., p. 323; *Bizzell v. Goldsboro, supra; S. v. Fowler, ante,* 290; McQuillin Municipal Ordinances, sec. 193; Dillon on Municipal Corporations, 5 ed., vol. 2, sec. 593; *Weadock v. Judge,* 156 Mich., 376; *Los Angeles County v. Hollywood Cemetery Assn.,* 124 Cal., 344; *City of Seattle v. Dencker,* 58 Wash., 501.

One of the able and distinguished attorneys for the defendant, *Standard Oil Company,* who argued the case in this Court, with persuasive logic, contended that monopoly came from two Greek words meaning "sole-seller"; that the six present sellers would be the sole sellers for all time in perpetuity, excluding the Standard Oil Company, and this was a monopoly—a wrong done to a legitimate business, so declared by this Court. To all of which we agree. It may be said, in reference to defendant, by way of pleasantry:

"The Devil was sick—the Devil a monk would be;
The Devil was well—the Devil a monk was he."

We will not discuss the anomoly of plaintiff's bringing an action to enforce its own ordinance, praying injunctive relief; but decide the case on its merits, as the point is not raised by the parties.

For the reasons given, the ordinance is void. The judgment of the court below is

Affirmed.

D. L. CARAWAN v. E. H. and J. A. MEADOWS COMPANY.

(Filed 23 March, 1927.)

Negligence—Accident.

Held, under the facts of this case, the injury for which damages are sought arose solely from an accident, and not through defendant's negligence.

Appeal by plaintiff from *Sinclair, J.*, at November Term, 1926, of Pamlico. Affirmed.

Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant.

From judgment dismissing the action, upon motion of defendant for nonsuit, at the close of the evidence offered by plaintiff, plaintiff appealed to the Supreme Court.

J. R. P. Carawan, F. C. Brinson, and Ward & Ward for plaintiff.
Moore & Dunn and Guion & Guion for defendant.

Per Curiam. All the evidence was to the effect that plaintiff's injuries resulted from an accident; there was no evidence from which the jury could have found that plaintiff was injured by the negligence of the driver of defendant's truck, as alleged in the complaint.

The sudden switching of the tongue of the trailer, which plaintiff had undertaken to guide, while the driver of the truck was pushing the trailer into the place where plaintiff wished the fertilizer on the trailer to be unloaded, was caused by the soft earth beneath the wheels, and not by the manner in which the driver was operating the truck. Plaintiff was thrown by the sudden switching of the tongue against the barn, and thus injured. His injuries were not caused by the negligence of defendant's driver. Defendant is therefore not liable in damages to plaintiff on account of his injuries.

The judgment dismissing the action is

Affirmed.

BENJAMIN W. BOBBITT v. S. PIERSON.

(Filed 23 March, 1927.)

Estates—Remainders—"Issue"—Children—Rule in Shelley's Case.

A devise to B. for his use or benefit as long as he lives, and at the time of his death to go to his issue: *Held*, the word "issue" is construed as children who take in remainder by purchase, the rule in *Shelley's case* not applying.

APPEAL by both parties from *Calvert, J.*, at November Term, 1926, of HALIFAX. Affirmed.

The court was of opinion, upon the statement of agreed facts submitted by the parties to this controversy without action, C. S., 626, that Benjamin W. Bobbitt is not seized of an estate in fee simple in and to the lot of land, which he has contracted to convey to S. Pierson, but that he is seized only of an estate for his life in and to said lot, with remainder to his children.

From judgment in accordance with this opinion, both parties appealed to the Supreme Court.

Dunn & Johnson for plaintiff.
No counsel for defendant.

PER CURIAM. Benjamin W. Bobbitt claims title to the lot of land which he has contracted to convey to S. Pierson, under the will of his grandfather, Walter V. Bobbitt. The said lot is therein devised to Benjamin W. Bobbitt, "for his own use and benefit as long as he lives, and at the time of his death, to go to his issue."

We concur in the opinion of the court below that Benjamin W. Bobbitt is not seized, by virtue of this devise, of an estate in fee simple in the lot of land which he has contracted to convey to defendant. He has an estate therein only for his life, with remainder to his issue. The word "issues," appearing in this will, must, in accordance with authoritative decisions of this Court, be construed as meaning children. *Etheridge v. Realty Co.*, 179 N. C., 407; *Ford v. McBrayer,* 171 N. C., 420; *Faison v. Odom,* 144 N. C., 108.

The rule in *Shelley's case* does not apply. The children of Benjamin W. Bobbitt, as his issue, take the remainder, after his death, as purchasers. Benjamin W. Bobbitt cannot convey to S. Pierson a fee-simple estate in and to the lot of land. The judgment is

Affirmed.

CLARENCE MADDEN v. J. F. MULLIGAN COMPANY, A CORPORATION.

(Filed 23 March, 1927.)

Negligence—Master and Servant—Evidence—Safe Place to Work.

Evidence tending to show that plaintiff was employed to carry sacks of cement from one to the other side of a part of a highway left open for passing vehicles, and was struck in so doing by an automobile, is insufficient upon the issue of defendant's actionable negligence in failing to furnish him a safe place to work.

APPEAL by plaintiff from *Sinclair, J.*, at October Term, 1926, of CARTERET. Affirmed.

Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant.

From judgment dismissing the action, upon motion of defendant for nonsuit at the close of the evidence offered by plaintiff, plaintiff appealed to the Supreme Court.

W. C. Gorham, Luther Hamilton, and Abernethy & Abernethy for plaintiff.

Moore & Dunn for defendant.

PER CURIAM. Plaintiff, in the performance of his duties as an employee of defendant, picked up a bag of cement, lying on the side of the road, which was under construction by defendant, and started across the road to the concrete-mixing machine, which was located on the opposite side of the road. He was struck by a passing automobile, knocked down, and severely injured. Defendant had located its concrete-mixing machine on one side of the road, and had piled sand and cement on the opposite side, to be used in making concrete for use in constructing the road. The space between the mixing machine and the sand and cement was about twelve feet; this space was kept open for travel.

Plaintiff alleges that defendant, his employer, was negligent in that it failed to exercise due care to furnish him a reasonably safe place to work, or to warn him of the approach of the automobile which struck and injured him, and that this negligence was the proximate cause of his injuries. The court was of opinion that upon all the evidence plaintiff could not recover of defendant, and, therefore, upon defendant's motion, rendered judgment dismissing the action as upon nonsuit. In this we find no error. The judgment is

Affirmed.

CARO SORRELL ET AL. v. RACHEL MARIE SORRELL ET AL.

(Filed 30 March, 1927.)

1. **Wills—Parent and Child — After-born Child — Statutes—Insurance, Life.**

   Where a child is born after the father has made a will, and no provision for the child is therein made, the mere fact that the father insured his life for the benefit of the child is insufficient to show the purpose of the testator to make provision in this way for the after-born child, and the latter will share in the estate of his father under the provisions of our statute, C. S., 4169.

2. **Parent and Child—Adopted Child—Statutes—Descent and Distribution—Wills—Testacy.**

   Where the petitioner adopts a child for life, C. S., 185, the latter is not entitled to share in the personal estate by virtue of the adoption alone, when the adopting parent has died testate.

3. **Wills—Parent and Child—After-born Child—Adoption of Child—Revocation—Statutes.**

   The subsequent birth of a child or the adoption of one under our statute, does not revoke the will of the father, C. S., 4135, as in case of subsequent marriage, C. S., 4134.

APPEAL by defendants from *Cranmer, J.*, at November Term, 1926, of HARNETT.

From a judgment on the pleadings in favor of plaintiffs the defendants appeal, assigning errors.

Clifford & Townsend for plaintiffs.
Mack M. Jernigan for defendants.

STACY, C. J. The material facts alleged in the complaint, which are admitted, or not denied by the answer, are as follows:

1. On 2 August, 1910, A. L. Sorrell, a resident of Harnett County, made a will in which he devised and bequeathed all of his property, real and personal (valued at $40,000), to his wife, Caro Sorrell, save and except a small tract of land conditionally devised to Ernest Ennis.

2. At the time of the execution and publication of the will aforesaid, the testator and his wife had no children.

3. On 31 December, 1913, by regular proceedings in Harnett Superior Court, the infant defendant, Rachel Marie Sorrell, was duly adopted for life as the daughter of the testator and his wife.

4. Thereafter a child was born to the testator and his wife, said child, John Collier Sorrell, being at present about three years of age and a defendant in this cause, duly represented by guardian.

5. On 5 July, 1923, immediately after the birth of John Collier Sorrell, the testator caused two policies of insurance to be issued on his life; the one in the sum of $2,500 for the benefit of his adopted daughter, and the other in a like sum for the benefit of his infant son, each policy containing a double indemnity clause in the event of assured's death by accident.

6. The testator, A. L. Sorrell, died on 30 June, 1926, as the result of an accident, and the sum of $5,000 on each policy was paid to the guardian of said children for their benefit.

Upon these, the facts chiefly pertinent, two questions arise: First, as to whether the procurement by A. L. Sorrell of a policy of insurance for $2,500, with double indemnity in case of his death by accident, payable to his infant son as sole beneficiary, was such a "provision" for said son as to exclude him from sharing in his father's estate under C. S., 4169, it appearing that no provision was made for the after-born child in the testator's will or by codicil added thereto; and, second, as to whether the adopted child, Rachel Marie Sorrell, stands in the same position as a child born after the making of its parent's will.

The statute provides: "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter."

Without deciding whether the "provision" for after-born children, which will exclude them from sharing in the parent's estate, entirely disposed of by prior will, must be made in the will itself, or by codicil added thereto, or whether the same result would follow if such provision were made by gift, settlement, or otherwise (*Flanner v. Flanner,* 160 N. C., 126; *Meares v. Meares,* 26 N. C., 192), we are of opinion that, on the facts of the present record, it was not the purpose of the testator to make provision for his son, and thus exclude him from sharing in his estate by taking out and carrying for his benefit the policy of life insurance above mentioned, nor was such in fact a provision for him as contemplated by the statute, but rather, we think, the testator, through inadvertence, or perhaps a correct understanding of the effect of the birth of a child after the making of his will, when no provision is made for each child, neglected or omitted to make any alteration in his last will and testament as originally executed and published in 1910. *Thomason v. Julian,* 133 N. C., 309; Note, Ann. Cas., 1913D, 1328.

It was said in *Meares v. Meares, supra,* that the provision made for the after-born child, which will exclude such child from taking under the statute, must be *ex provisione parentis,* and not otherwise. Such would seem to be in keeping with the clear meaning of the statute.

Under this view it follows that the defendant, John Collier Sorrell, is entitled to share in his father's estate, the same as if his father had died intestate. *Rawls v. Ins. Co.,* 189 N. C., 368; *Dixon v. Pender,* 188 N. C., p. 794.

It is contended that what has been said in regard to the policy of insurance, taken out for the benefit of the testator's son, applies equally to the policy issued in favor of his adopted daughter, and that she, too, under the statute, C. S., 185—her adoption being for life—is entitled to all the rights belonging to the relationship of parent and child. The argument is not without its sympathetic appeal, but Rachel Marie Sorrell, the adopted daughter, on the facts of the present record, is not entitled to a child's share of the testator's estate, for, while she is endowed "with all the duties, powers and rights belonging to the relationship of parent and child," under the law relative to the adoption of minors, yet, by the express terms of the statute, it is only in case the adoption be for the life of the child "and the petitioner die intestate" that the order of adoption is to have the effect of enabling "such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it." This same statute also provides: "The child shall not inherit and be entitled to the personal estate, if the petitioner specially sets forth in his petition such to be his desire and intention." The record is silent on this latter point; however, the question is not material.

Here, the adopting parent, or petitioner as above designated, died testate, hence the right of inheritance or the right to a distributive share of the personal estate of the parent, does not arise or enure to the benefit of the adopted child. 28 R. C. L., 192.

In this jurisdiction, the subsequent birth of issue, or adoption of a child, does not revoke a will, as does a subsequent marriage in certain cases. C. S., 4134. "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." C. S., 4135.

Accordingly, as the law is now written, the one shall share, and the other shall not. This may seem an inequality, but it was ever thus. Even so, "Two women shall be grinding at the mill; the one shall be taken, and the other left." Mat. 24:41.

Let the cause be remanded, to the end that further proceedings may be had as the law directs and the rights of the parties require.

Error and remanded.

TOM ODOM, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 March, 1927.)

1. **Negligence—Automobiles—Third Persons — Railroads — Crossings—Collisions.**

Evidence that plaintiff's intestate was riding on the running board of an auto-truck with the implied permission of the driver, who was in full control of its operation, does not tend to establish the responsibility of the intestate for the negligence of the driver in crossing a railroad track, and the killing of the intestate in consequence of a collision of the truck with the defendant railroad company's train.

2. **Same—Imminent Peril—Place of Safety—Contributory Negligence—Questions of Law—Courts.**

The improvident act of one placed in imminent peril of his life by the negligent act of another, under circumstances requiring quick decision for the preservation of his life, does not alone bar his right of action upon the issue of contributory negligence, when the intestate, by a fortunate circumstance could have remained in a place of safety.

3. **Same—Evidence—Questions for Jury.**

The plaintiff's intestate, by implied invitation of the driver of an auto-truck, was riding on the running board of the truck when it crossed defendant's railroad track, where it was struck by the defendant's passing train after its flagman or a member of its crew had signalled the driver of the truck to cross, which the truck safely did, but the intestate, in imminent peril of his life, jumped from the truck and was killed by the train: *Held*, the issue of contributory negligence should have beeen submitted to the jury.

APPEAL by plaintiff from *Midyette, J.*, at October Term, 1926, of CUMBERLAND.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

There is evidence on behalf of the plaintiff tending to show that the witness, Preston Cope, and the deceased, Ernest Skeen, were both employees of the Alabama Concrete Products Company, which company had a contract to place one of the concrete State highways near the city of Fayetteville. Cope was a truck driver and the deceased worked at the concrete mixing machine. It was the custom of the deceased to catch a ride out on the road to the mixing plant on some of the trucks operated by the drivers of the concrete company. On the morning of 21 August, 1924, Cope was driving an empty truck along Chance Street, in the city of Fayetteville, going westwardly and had to cross four tracks of the Atlantic Coast Line Railroad Company to reach the plant of the concrete company on the west side of the railroad track, located on Orange Street. When Cope stopped the truck at the "N. C. Stop" sign the deceased jumped on the running board of the Ford truck on the left-hand side of the truck, and then the two started to cross the railroad tracks. Cope drove slowly toward the crossing, and after arriving within about two and one-half feet of the track upon which it later appeared the train was passing, he heard some one "holler" "Look Out!" two or three times. Looking, he first saw nothing, but looking again to the left and on the side of the truck where Skeen was riding, he saw a freight train coming at a speed of 12 to 15 miles per hour, backing toward the crossing. The truck was still at a standstill about two and a half feet from the track, when the brakeman, or man on the train, "waved" to them and told them to proceed across the track, and before the truck had yet moved, the brakeman repeated his direction to go across three or four times. Cope, the driver, finally, in obedience to this direction proceeded across, when, just as the train was about to collide with the truck, and on the side where Skeen was riding, Skeen jumped from the truck and was caught by the train and instantly killed. The truck cleared the track and was not struck. No whistle was sounded. No bell was rung on the train. The witness, Gregory, an ex-railroad man, testified that the train could have been stopped after the truck started across before it reached the point where the truck was crossing.

On motion of the defendant, made at the close of plaintiff's evidence, judgment was entered as in case of nonsuit, dismissing the action, from which the plaintiff appeals, assigning error.

Bullard & Stringfield for plaintiff.
Rose & Lyon for defendant.

STACY, C. J., after stating the case: The facts of the instant case are so nearly like those in the case of *Parker v. R. R.*, 181 N. C., 95, and the principles of law applicable are so thoroughly discussed in that case, with full citation of authorities, that we deem it unnecessary to do more than refer to the *Parker case,* as authority for reversing the present judgment of nonsuit. See, also, *McLellan v. R. R.*, 155 N. C., 1.

The evidence of negligence is plenary, and even though Cope, the driver of the truck, may have been guilty of negligence, which also contributed to the plaintiff's intestate's injury and death, still the plaintiff would be entitled to have the case submitted to the jury, for, in this jurisdiction, the negligence of the driver of a public or private conveyance is not imputed to a passenger for hire or a guest therein, unless such passenger or guest exercise some kind of control or authority over the driver of the conveyance. *Duval v. R. R.*, 134 N. C., 331; *White v. Realty Co.*, 182 N. C., 536; 20 R. C. L., 163.

Nor can it be said, as a matter of law, from the evidence appearing on the present record, that plaintiff's intestate's alleged contributory negligence was such as to bar a recovery. In *Dyer v. Erie Ry. Co.*, 71 N. Y., 228, it was held (as stated in the last head-note): "The mere fact that a person jumps from a vehicle in which he is traveling, where there is imminent danger of its coming in collision with an approaching train at a crossing, does not bar a recovery against the railroad corporation, although it appears that he made a mistake and would have escaped injury had he remained quiet."

This position is directly upheld in *Parker v. R. R., supra,* and is supported, in tendency at least, by what was said in *Norris v. R. R.*, 152 N. C., 513.

There was error in entering judgment as of nonsuit. This will be reversed and the cause remanded for trial before a jury.

Reversed.

JAMES C. DAVIS, DIRECTOR-GENERAL OF RAILROADS, v. MRS. LULA S. FORD, ADMINISTRATRIX OF G. W. FORD.

(Filed 30 March, 1927.)

1. **Carriers—Railroads—Freight Charges—Consignor and Consignee—Contracts.**

   A railroad company, unless by special provision of the contract of carriage, either parol or written, expressed or implied in the course of mutual dealings, may recover its freight charges for the transportation of a shipment from the consignee thereof.

2. **Same—Burden of Proof—Evidence—Questions for Jury.**

   The burden is on the consignor of a shipment by rail to show a special contract by which the company should look to the consignee for the payment of the freight charges thereon, and where relied on, it is a question for the jury to determine under the evidence.

3. **Government—Limitation of Actions—War — Carriers — Railroads — Director-General.**

   The placing of carriers under Federal control as a war measure was the creation of a governmental agency under the Director-General of Railroads, and the statute of limitations will not run against the collection of unpaid freight charges in an action of such Director-General to recover them against the consignee of the shipment.

APPEAL by plaintiff from *Bond, J.*, at August Term, 1926, of FRANKLIN. Reversed.

The complaint is that defendant is indebted to plaintiff in the sum of $99.68, freight charges on a shipment of lumber. In May, 1918, while the Seaboard Air Line Railway Company was being operated by the United States Government, acting through the Director-General of Railroads, G. W. Ford shipped a car of lumber to George W. Montgomery, Commanding Officer, Frankford Arsenal, Philadelphia, Pa. The freight was not paid either by consignor or consignee. The action is against the administratrix of consignor.

Defendant denied liability and plead the statute of limitation. Defendant also set up plea of express or special contract with plaintiff that consignee was to pay the freight before delivery. At the conclusion of plaintiff's evidence defendant moved the court for judgment as in case of nonsuit, which was allowed, and plaintiff excepted, assigned error and appealed to the Supreme Court.

Murray Allen for plaintiff.
W. M. Yarborough for defendant.

CLARKSON, J. "The general rule is that stipulations in a bill of lading that the goods are to be delivered to the consignee 'he or they paying freight,' or any similar provisions, are for the benefit of the carrier, so that delivery to the consignee without collection of the freight will not release the consignor from liability therefor, *unless there is some special stipulation amounting to an express agreement by which the consignor is to be exonerated.*" (Italics ours.) Note: 24 A. L. R., 1163, annotated under *N. Y. Central R. R. Co. v. Warren Ross Lumber Co.,* 234 N. Y., 261; *Railway Co. v. Coal and Coke Co.* (W. Va.), 65 L. R. A. (N. S.), 663; *Spencer v. White,* 23 N. C., p. 236; *R. R. v. Latham,* 176 N. C., p. 417. The United States Supreme Court and the weight of authorities sustain the above rule.

"The obligation to require payment for the goods, as a condition of their delivery, does not arise from the implied duty of the carrier. It must rest upon contract, either express or implied from the circumstances. . . . And such contract may be verbal, and need not be incorporated in the carrier's receipt." Vol. 2, Hutchinson on Carriers, 3 ed., p. 811. See discussion in this work, pages 806 to 811.

The defendant contends that there was an *express or special* contract on the part of the railroad company with defendant's intestate that it would collect the freight from the consignee before the delivery of the lumber. That the case does not turn upon any general rule or upon the terms of any particular bill of lading, but must be determined in accordance with the agreement of the parties under the express or special contract made by them in respect to this particular shipment.

The defendant further contends that plaintiff's evidence showed, by direct, circumstantial and implication, that there was a special or express contract that the carrier was to collect the freight from the consignee before delivery, and that all the evidence introduced was to that effect, therefore the nonsuit of the court below was correct.

On the other hand, it is contended by the plaintiff that as to whether or not there was a special or express contract was a question of fact to be determined by the jury from the evidence; that this special or express contract was a matter in dispute.

Without commenting on the probative force of the evidence, we think the question of fact should have been left for the determination of a jury.

On the question of the statute of limitation: The Supreme Court of the United States has held in *E. I. DuPont DeNemours Co. v. Davis, Director-General of Railroads,* 264 U. S., 456, and in *Davis, Director-General of Railroads v. Corona Coal Co.,* 265 U. S., 219, that an action by the Director-General of Railroads is an action on behalf of the United States in its governmental capacity, and is subject to no time limitation in the absence of congressional enactment clearly imposing it.

For the reasons given, the judgment of nonsuit is

Reversed.

KIRBY SMITH ET AL. v. NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY.

(Filed 30 March, 1927.)

1. **Insurance, Fire—Policies—Contracts—Breach of Condition That Invalidates the Policy—Waiver.**

   A breach of the condition of a policy of fire insurance, statutory form (C. S., 6437), that the policy is void if the insured has not the sole and unconditional title is valid and enforceable by the company without the necessity of disclaiming liability upon notice or knowledge of its infraction, and inaction on its part in this respect is not a waiver thereof.

2. **Same—Mortgages—Notice to Company.**

   Where a policy of fire insurance upon a dwelling contains the condition making the policy void if the ownership of the property is not sole and unconditional, and the property is mortgaged at the time with the loss payable clause incorporated, notice to the agent of a second mortgage on the dwelling given some time after the second mortgage was given, but before the occurrence of the fire occasioning the loss, will not alone render the insurer liable on the policy contract.

3. **Insurance, Fire—Principal and Agent—Conditions—Waiver.**

   The rule that the agent of a fire insurance company may waive conditions affecting the validity of a policy generally apply to such conditions existing at the time of the issuance of the policy.

CIVIL ACTION, before *Cranmer, J.*, at October Term, 1926, of WAYNE. On 21 September, 1924, the plaintiff secured a policy of fire insurance for $3,000 from the defendant upon his dwelling and household and kitchen furniture. The plaintiff resided about eight miles from Goldsboro. The form of the policy was in accordance with the provisions of C. S., 6437, and expired at noon on 21 September, 1925. On 10 January, 1921, the plaintiff and his wife executed a deed of trust to Julian Price, trustee, for the benefit of the Jefferson Standard Life Insurance Company. On 26 February, 1921, the defendant and his wife executed a mortgage on the premises to H. B. Parker to secure an indebtedness of $306.00. Default was made in the payment of the indebtedness due the Jefferson Standard Life Insurance Company and said company advertised and sold the property of the plaintiff on 19 May, 1925, and the deed for the property was made by Julian Price, trustee, to H. B. Parker under and by virtue of the terms of said deed of trust. On the morning of 20 September, 1925, the dwelling-house and barn and stables of plaintiff were destroyed by fire. The plaintiff testified that more than thirty days prior to 20 September, 1925, he notified Z. T. Brown, agent of the defendant, that the Jefferson Standard Life Insurance Company was offering his property for sale, and that he further notified the agent of the Parker mortgage. This was the first notice the plaintiff had given of the Parker mortgage, and was given after the land had been sold under deed of trust, and the deed therefor delivered to H. B. Parker.

At the conclusion of the evidence the trial judge allowed a motion of nonsuit, and the plaintiff appealed.

J. Faison Thomson for plaintiff.
D. C. Humphrey, Dickinson & Freeman for defendant.

BROGDEN, J. The policy of insurance in controversy contained, in accordance with statutory requirement, the usual clauses rendering the policy void if the interest of the insured should be other than unconditional and sole ownership or of sale of the property by reason of any mortgage or deed of trust. In order to obviate the legal effect of these clauses the plaintiff relies upon the doctrine of waiver. This contention rests upon the fact that a short time prior to the fire, and long after the policy had been issued, the plaintiff had notified the agent of the defendant of the existence of the Parker mortgage and the advertisement of the property. In *Hardin v. Insurance Co.*, 189 N. C., 423, *Adams, J.*, states the rule of law applicable, as follows: "It has been held in a number of cases that in case of a breach of condition which invalidates the policy, the company is not bound at its peril, upon notice of such breach, to declare the policy forfeited or to do or say anything to make the forfeiture effectual, and a waiver will not be inferred from mere silence or inaction on its part. It may wait until claim is made under the policy, and then rely on the forfeiture in denial thereof or in defense of a suit brought to enforce payment of it."

The notice given by plaintiff to the agent was not at the time the policy was written and delivered, but long after it had been in force.

The rule applying to such a state of facts is thus stated in *Bullard v. Insurance Co.,* 189 N. C., 34: "The provision restricting the agent's power to waive conditions does not, as a general rule, refer to or include conditions existing at the inception of the contract, but to those arising after the policy is issued. Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be the knowledge of his principal." *Hayes v. Ins. Co.,* 132 N. C., 702; *Weddington v. Ins. Co.,* 141 N. C., 234; *Johnson v. Ins. Co.,* 172 N. C., 142; *Ins. Co. v. Lumber Co.,* 186 N. C., 269.

Applying the well established rules of law to the facts as disclosed by the record, we conclude that the judgment of nonsuit was correct.

Affirmed.

IN RE SMILING.

(Filed 30 March, 1927.)

1. **Indian Legislative Committee—Administrative Boards.**

   The legislative committee appointed to pass upon the admissibility of persons applying for permission to enter the Indian schools of Robeson County is an administrative board and not a court, and has the power to reinvestigate the matter of qualification of an applicant, and reverse their former conclusion that he was eligible.

2. **Judgments—Estoppel—Res Adjudicata—Courts.**

   The plea of *res adjudicata* must be raised and insisted upon in the proceedings before a board exercising judicial functions, or it will be deemed to have been waived.

APPEAL by petitioners from *Midyette, J.,* at October Term, 1926, of ROBESON.

This appeal involves the right of the petitioners to attend the Indian Public Schools of Robeson County. The matter reached the Superior

Court by appeal from a decision of the Legislative Committee for the Indian race in said county.

The facts are succinctly set out in the judgment of the Superior Court and are as follows:

"Upon the hearing, the petitioners having announced that all questions involved in this appeal from the Legislative Committee to the Superior Court are abandoned, except the plea of estoppel raised by the petitioners upon the record and evidence offered before the court upon such plea; and, upon such hearing, the court finds the following facts:

"1. That, under an act of the Legislature of North Carolina, Public-Local Laws 1921, ch. 426, a committee was authorized to pass upon the admissibility of persons applying for permission to enter the Indian schools of Robeson County.

"2. That, objection having been made to the admission of the petitioners to the Indian schools of Robeson County, the Legislative Committee, after notice to all parties, proceeded to hold a hearing to pass upon the rights of the petitioners to enter the said Indian schools of Robeson County, said hearing having been held on 11 April, 1925. At such hearing the Legislative Committee admitted said children to the Indian schools of Robeson County.

"3. Thereafter, upon further information, the committee notified the petitioners and respondents that a further hearing would be held to pass upon the rights of the petitioners to attend the Indian schools of Robeson County, and such hearing would be held 18 April, 1925. On 18 April, 1925, at the appointed time, in response to the notice given, the petitioners and the respondents appeared before the committee.

"4. Both petitioners and respondents appeared before the committee on 18 April, 1925, at the place named, and both announced their readiness for a hearing. The respondents and petitioners both offered evidence as to the rights of the said petitioners to enter the Indian schools of Robeson County. No plea of *res adjudicata* was made by the petitioners at the second hearing, but they appeared before the committee, recognized the rights of the committee to hear the matter and offered evidence upon their contention as to the right of petitioners to enter the Indian schools of Robeson County.

"5. At such hearing had on 18 April, 1925, after hearing the evidence of petitioners and respondents, the committee found, as a fact, that the said petitioners were not Indians and were not entitled to enter the Indian schools of Robeson County, and, by unanimous vote, ordered that the said petitioners be not admitted to the said Indian schools of Robeson County.

"From the judgment of 18 April, 1925, the petitioners appealed to the Superior Court of Robeson County.

"Upon the foregoing facts, the court being of the opinion that the plea of estoppel now raised by the petitioners cannot be sustained, it is thereupon ordered, adjudged and decreed that the action of the Legislative Committee, debarring the said petitioners from the Indian schools of Robeson County, be affirmed and ratified, and it is ordered that the said petitioners are not entitled to the benefits of the Indian schools of Robeson County."

From this judgment the petitioners appeal, assigning error.

John B. McLeod, W. Y. Floyd and Johnson & Johnson for petitioners.

Dickson McLean, H. E. Stacy, C. W. Pridgen, Jr., T. A. McNeill and W. S. Britt for respondents.

Stacy, C. J. It is the position of the petitioners, appellants, that when the Legislative Committee decided to admit them to the Indian schools of Robeson County on 11 April, 1925, the said committee was thereafter *functus officio* and without authority to reopen the matter, and that the contrary decision rendered on a subsequent hearing is a nullity.

The trial court correctly held that the plea of *res adjudicata* was not available to the petitioners. In the first place, the Legislative Committee, created by chapter 426, Public-Local Laws 1921, is an administrative board and not a court; and, in the second place, even if said committee were clothed with judicial powers, the plea of *res adjudicata,* not having been insisted upon before the committee, is deemed to have been waived. *Blackwell v. Dibbrell,* 103 N. C., 270.

The judgment will be upheld.

Affirmed.

In re NELLIE BARTLETT CHASE.

(Filed 30 March, 1927.)

1. **Habeas Corpus—Insanity—Legality of Detention of Petitioner.**

The question to be determined by the judge in *habeas corpus* proceedings is the legality of the restraint of the petitioner, and such proceedings are not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. C. S., 2234, 2235.

2. **Same—Certiorari.**

When the petitioner in *habeas corpus* has been adjudged insane and her detention is ordered by a court of lunacy of another state, the judge of the Superior Court in this State by whom the proceedings of *habeas corpus* is heard should determine the validity of the order of the adjudication of insanity when the same is properly presented to him, and this is the determinative question involved, and upon failure to have done so the case will be remanded.

3. **Same—Courts — Temporary Orders — Restraint — Inquisition of Insanity.**

When the judge before whom proceedings in *habeas corpus* are had, involving the question of the petitioner's detention upon the validity of an inquisition of lunacy in another state: *Held*, should the matter be remanded and the proceedings in lunacy be held invalid, and it appears to the trial judge that the petitioner should be restrained on account of present insanity, he may issue a temporary order for her safety and welfare pending proceedings lawfully to be held in such instances.

APPEAL by petitioner from an order of *Schenck, J.*, refusing the petitioner's release upon *habeas corpus*. From BUNCOMBE. The material facts are stated in the opinion.

John Neal Campbell, Wells, Blackstock & Taylor and Joseph W. Little for petitioner.

Mark W. Brown for petitioner's guardian.

ADAMS, J. The case was brought to this Court by *certiorari* to review a judgment denying the petitioner's discharge upon a writ of *habeas corpus*. It is alleged in the petition that Mrs. Chase is detained in a hospital in the city of Asheville under the pretense that she is insane; that no proper commitment can be found; and that her restraint is without authority of law. The writ was duly returned and an answer was filed by her guardian, who alleged not only that she is insane, but that her detention was expressly authorized by a judgment given in an inquisition of lunacy. It appears from the record that in May, 1926, such an inquisition was instituted in the county court of Dade County, in the State of Florida, and that the petitioner was formally adjudged to be insane. Her brother was appointed guardian of her person and estate, and she was put in his care and custody "to be admitted to a private hospital for the indigent insane for care, maintenance and treatment." Thereafter she was brought to Asheville and confined in the hospital from which she now seeks to be released.

When the petition was heard affidavits, record evidence, oral testimony and letters were introduced, and the judge found certain facts upon which the judgment was based. These facts embody the inquisition in Florida, the appointment there of a guardian of the petitioner's person and estate, her commitment to the hospital in Asheville, and her present insanity, together with the specific finding that the petitioner "could not be discharged and allowed to go at large without endangering the safety of herself and the safety of others." Upon the facts it was adjudged that the petition be denied and the petitioner be committed to the care and custody of the Appalachian Hall for treatment.

The petitioner was first committed under an inquisition of lunacy prosecuted outside this State, and upon the hearing before the judge and in the argument here she assailed the inquisition upon the ground that it is void upon its face, or if not, that upon all the evidence it should be declared void. Her deduction is that her restraint is therefore illegal. There is nothing in the judge's order which disposes of this question—no adjudication that the inquisition is sufficient in law to justify the commitment. The fact that the petitioner is insane does not necessarily imply that her detention has the sanction of law. To have the legality of her restraint inquired into and the validity of the inquisition determined is the cardinal purpose of her petition. It is provided that the court or judge before whom the party is brought on a writ of *habeas corpus* shall examine into the facts and into the cause of the confinement, and shall discharge the party if no legal cause be shown for the restraint. C. S., 2234, 2235.

Habeas corpus is in the nature of a writ of error to the extent of examining into the legality of a person's detention, but it is not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. *S. v. Edwards,* 192 N. C., 321. The inquiry is not addressed to errors, but to the question whether the proceeding and judgment are nullities or whether they are warranted by law. *In re Holley,* 154 N. C., 163. So at the hearing the judge was confined to the question whether the petitioner was unlawfully restrained of her liberty, or whether she had been committed to the hospital in consequence of proceedings legally and properly constituted for that purpose; for at the hearing it was not permissible to convert the writ into a proceeding in the nature of an inquisition of lunacy for the purpose of adjudging, as cause for continued restraint, the petitioner's present mental condition. Apparently, this was the practical result, as the foundation of the judgment is a finding of insanity.

The cause will be remanded to the Superior Court of Buncombe County with instructions to determine whether the petitioner is unlawfully restrained of her liberty. If it should be adjudged that her confinement is unlawful, and that she is now insane, a temporary order may be made for her safety and welfare pending such further inquiry or action as may be deemed necessary or expedient in the premises.

Remanded.

LENNON F. FOLEY v. J. Q. IVEY ET AL.

(Filed 30 March, 1927.)

Estates—Rule in Shelley's Case—Fee Simple—Deeds and Conveyances.

Where in the premises of a deed lands are conveyed to B., "and to his heirs and assigns forever," and after the description of the land, "to and for B. during his natural life, and after that to the heirs of his body only, followed by the *habendum* "to have and to hold . . . unto the said party of the second part, his heirs and assigns forever": *Held,* B. takes an estate in fee.

APPEAL by defendants from *Barnhill, J.,* at February Term, 1927, of ROBESON.

Dickson McLean, H. E. Stacy and C. W. Pridgen, Jr., for appellants.
W. Osborne Lee and Robert E. Lee for appellees.

ADAMS, J. This is a controversy without action. C. S., 626. The plaintiff contracted to sell and the defendants to buy a tract of land at the agreed price of six hundred dollars; but when a deed properly executed and sufficient in form was tendered, the defendants declined to accept it or to make payment on the ground that the plaintiff has only a life estate in the land. The land was conveyed by the elder Frederick Bass and his wife to Frederick Bass, Jr., and afterwards to the plaintiff by Frederick Bass, Jr., and his wife. The single question is whether the younger Frederick acquired a title in fee; if so, the plaintiff likewise has the fee and the defendants must comply with their contract. It was adjudged at the hearing that the plaintiff has a title in fee and that the defendants must pay the purchase price.

In the premises the deed purports to convey the land to Frederick Bass, Jr., "and to his heirs and assigns forever." The description is followed by the clause, "this deed shall hold good to and for the said Frederick Bass, Jr., during his natural life and after that to the heirs of his body only"; and this is succeeded by the *habendum,* "To have and to hold . . . unto the said party of the second part, his heirs and assigns forever."

The words used in the premises and in the habendum clearly import a fee; and in the intervening clause the limitation by way of remainder after the life of Frederick Bass, Jr., "to the heirs of his body only," under the rule in *Shelley's case,* entitled the ancestor to the whole estate. *Daniel v. Bass, ante,* 294; *Benton v. Baucom,* 192 N. C., 630. In our opinion the addition to the usual formula of the word "only" is not sufficient to justify the conclusion that the phrase "heirs of his body" was not employed in the usual technical sense, but on the other hand as indicating issue or children. It will be noted that there is no limitation over in the event of the grantee's death without "bodily heirs," or "heirs of his body," or "lawful heirs," and in this respect several of the cases cited in the appellants' brief are distinguishable from the case under consideration.

Affirmed.

J. F. SIMPSON, TRUSTEE, v. BEAUFORT COUNTY LUMBER COMPANY ET AL.

(Filed 30 March, 1927.)

Contracts—Statute of Frauds—Sufficient Writings—Principal and Agent.

A series of written letters, telegrams or other papers, documents, etc., signed by the parties or their authorized agents relating to the subject-matter of the transaction, will be construed together, and when the contract appears to be complete, the omissions in some of the writings supplied by others, it is sufficient in contemplation of the statute of frauds to be binding upon the parties thereto.

APPEAL by plaintiff from *Bond, J.*, at Chambers, Wilmington, N. C. From BRUNSWICK.

Civil action for specific performance of an alleged contract to buy timber, brought by plaintiff, vendor, against the vendee or purchaser. A jury trial was waived, and, by consent of both parties, the case was heard and determined by the judge without a jury. The action was dismissed, because, in the opinion of the presiding judge, the plaintiff failed to show a compliance with the statute of frauds. From such judgment the plaintiff appeals, assigning error.

Wright & Stevens for plaintiff.

C. Ed. Taylor, Dickson McLean, H. E. Stacy and Carl W. Pridgen, Jr., for defendants.

STACY, C. J. Following negotiations had between the duly accredited agents of the parties, relative to the sale and purchase of a tract of timber situate in Brunswick County, the agent of the plaintiff, on 30 May, 1925, wired the agent of the defendant as follows:

"My people accept your offer nine thousand for the timber. Will write Monday."

This telegram was confirmed by letter (undated) the following Monday, in which reference was made to three timber deeds, descriptive of the timber to be sold, and said letter also contained a request that the defendant have its attorney examine title, prepare deeds, and report without delay.

On 5 June following, the general superintendent and agent of the defendant wrote the agent of plaintiff as follows:

"Your letter without date received. I have been away from town ever since Sunday, and it has just come to my attention. Am also in receipt of your telegram advising that your people accepted our offer. We will place this matter in our lawyer's hands, and as soon as we have been able to get report from him will let you hear from us further.
Yours truly,
BEAUFORT COUNTY LUMBER COMPANY.
E. M. DEWEY, *General Supt.*"

The title was duly approved by defendant's attorney; whereupon proper deeds were executed by plaintiff and tendered to the defendant with demand for payment in accordance with the contract.

Upon defendant's refusal to accept the deeds and pay the purchase price, plaintiff brings this action to compel performance. There was other correspondence between the agents of the parties, from which the following, signed by the defendant's general superintendent and addressed to plaintiff's agent, under date of 18 August, 1925, is taken: "I will do just what I have promised you I would do in regard to this matter, and try to expedite the final closing of this matter all possible."

Has plaintiff shown a sufficient memorandum in writing, signed by the party to be charged therewith, or by some other person by it thereto lawfully authorized, as required by the statute of frauds? C. S., 988. We think he has. A valid contract, within the statute of frauds, "may consist of one or many pieces of paper, provided the several pieces are so connected physically or by internal reference that there can be no uncertainty as to the meaning and effect when taken together. But this connection cannot be shown by extrinsic evidence." *Mayer v. Adrian,* 77 N. C., 83; *Mfg. Co. v. Hendricks,* 106 N. C., 485; *Gordon v. Collett,* 102 N. C., 532; *Neaves v. Mining Co.,* 90 N. C., 412.

The law on the subject is stated in 27 C. J., 259-261, as follows: "The note or memorandum required by the statute of frauds need not be contained in a single document, nor, when contained in two or more papers, need each paper be sufficient in contents and signature to satisfy the statute. Two or more writings properly connected may be considered together, matters missing or uncertain in one may be supplied or rendered certain by the other, and their sufficiency will depend upon whether, taken together, they meet the requirements of the statute as to contents and signature. The rule is frequently applied to two or more, or a series of letters or telegrams, or letters and telegrams sufficiently connected to allow their consideration together. But the rule is not confined in its application to letters and telegrams; any other documents can be read together when one refers to the other. The rule has been applied so as to allow the consideration together, when properly connected, of a letter and an order of court, a letter and an order for goods, letters and undelivered deeds, correspondence and accompanying papers, a check and a letter, a receipt and a check, a memorandum of agreement and a deed, and a contract, deed, and instructions to a depositary in escrow. Matters not contained in one paper, or not stated therein with sufficient definiteness and certainty, such as the name of a party, a description of the subject-matter, a statement of the consideration, or the terms of payment, are frequently found to be adequately stated in another paper which is sufficiently connected with the former paper to justify their consideration together."

The correspondence in the instant case is quite as plain and explicit as that held to be sufficient to meet the requirements of the statute of frauds in *Dowdy v. White,* 128 N. C., 17.

Let the cause be remanded for further proceedings not inconsistent with this opinion.

Error.

UNION CENTRAL LIFE INSURANCE COMPANY AND LOUIS BREILING v. ADA G. CATES AND HER HUSBAND, PAUL CATES, M. U. HODGES, AND J. R. WOOLARD.

(Filed 30 March, 1927.)

1. Deeds and Conveyances—Mortgages—Forgeries.

Where pending negotiations in sale of the fee-simple unincumbered title to lands, the attorney for the proposed purchaser discovers a duly registered mortgage against the lands uncanceled of record in the office of the register of deeds, and the attorney for the owner agrees to have the same canceled of record; and thereafter surreptitiously obtains the cancellation stamp of the register of deeds and forges his signature so that apparently the mortgage was canceled under the provisions of C. S., 2594, subsec. 2, and relying thereon the proposed purchaser accepts the deed and pays the consideration: *Held,* the supposed cancellation of the mortgage was void as against the mortgagee who had no notice thereof until immediately before bringing his action to have the supposed cancellation declared void.

2. Same—Burden of Proof.

In the mortgagee's suit to have declared void the forged cancellation of his mortgage appearing by endorsement on the books of the register of deeds, the burden is on the plaintiff to establish the forgery by the preponderance or greater weight of the evidence.

3. **Same—Instructions—Appeal and Error—Harmless Error.**

An instruction that the plaintiff had the burden of proving his case by clear, strong and cogent proof, when he is only required to do so by the preponderance of the evidence, is not reversible error to defendant's prejudice.

4. **Instructions—Directing Verdict—Evidence.**

Where only one reasonable inference can be drawn from all the evidence in the case, an instruction directing a verdict accordingly if the jury so find the facts, is proper.

5. **Deeds and Conveyances — Consideration — Assumption of Mortgage Debt—Mortgages—Foreclosure—Equity—Exoneration.**

Where a mortgage on lands describes two separate tracts of land in their order as No. 1 and No. 2, and the owner has since conveyed No. 2 to a grantee who has assumed the mortgage debt as a part of the consideration he has paid for the deed, the doctrine of equality is equity does not apply, and in a judgment of foreclosure the second tract should first be sold, and the proceeds applied to the satisfaction of the mortgage debt in favor of the purchaser of the first tract, in whose deed there was no such provision.

APPEAL by defendant M. U. Hodges from *Nunn, J.*, at October Term, 1926, of BEAUFORT. No error.

Action to have cancellation of deed of trust, appearing on the record in the office of the register of deeds of Beaufort County, N. C., declared null and void, on the ground that said cancellation is a forgery, and for decree that the lands conveyed by said deed of trust be sold for the payment of the indebtedness secured therein.

Issues submitted to the jury were answered as follows:

1. Was the cancellation of the deed of trust from Ada G. Cates and her husband to Louis Breiling, dated 31 January, 1918, appearing in Book 203, at page 360, register's office of Beaufort County, forged by N. L. Simmons? Answer: Yes.

2. Is the defendant M. U. Hodges a purchaser for value of the land described in his deed from Lena Swain and husband, and without notice of such forgery, as alleged in the answer? Answer: Yes.

3. Is the defendant J. R. Woolard a purchaser for value of the land described in his deed from Ada G. Cates and husband, and without notice of such forgery? Answer: Yes.

From judgment upon the verdict, and upon admissions of the parties, made during the trial, defendant M. U. Hodges appealed to the Supreme Court.

H. C. Carter for plaintiffs.
Small, MacLean & Rodman for defendant M. U. Hodges.
Wiley C. Rodman for defendant J. R. Woolard.

CONNOR, J. On 31 January, 1918, defendants Ada G. Cates and her husband, Paul Cates, executed a deed of trust, conveying to plaintiff Louis Breiling lands described therein, for the purpose of securing the payment of certain notes, executed by the grantors, aggregating the sum of $2,000, and payable to the Union Central Life Insurance Company. The lands conveyed by said deed of trust are situate in Beaufort County; they are described therein as the first tract, containing seven acres, known as the La Barbe Summer Residence, and as the second tract, containing sixty acres, known as the Stallings land. The deed of trust was duly recorded in the office of the register of deeds of Beaufort County. The notes secured therein have not been paid in full; the amount now due on said notes is $1,693.52, with interest thereon from 1 November, 1923.

On 19 October, 1919, the defendants Ada G. Cates and her husband, Paul Cates, executed a deed, conveying the second tract of land, described in said deed of trust, to Luke Jackson. This deed was duly recorded on 24 October, 1919. It recites a consideration of $10 and other valuable considerations, and contains a clause in words as follows:

"But this deed is made by the parties of the first part and is accepted by the party of the second part, subject to an existing mortgage indebtedness of the parties of the first part to the Union Central Life Insurance Company of $2,000, secured by deed of trust of the parties of the first part to Louis Breiling, dated 31 January, 1918, the balance of which indebtedness the said party of the second part hereby assumes and agrees to pay and discharge as part of the purchase price of the tract of land above described; and the party of the second part hereby agrees to protect the parties of the first part from any liability whatever under said mortgage by reason of its containing a certain tract of seven acres, known as the La Barbe Summer Residence."

Defendant M. U. Hodges has by *mesne* conveyances become the owner of said second tract, claiming title thereto under the deed from Ada G. Cates and her husband to Luke Jackson; he claims title immediately under deed from Lena Swain and her husband, to whom Luke Jackson conveyed said land by deed duly recorded on 12 April, 1923; the deed from Lena Swain and her husband to defendant M. U. Hodges was duly recorded on 21 December, 1923. M. U. Hodges is a purchaser for value of said land; he relied in good faith upon the validity of the cancellation of the deed of trust from Ada G. Cates and her husband to Louis Breiling, as same appeared upon the record in the office of the register of deeds at the time he paid the purchase price for said land to Lena Swain and her husband, his grantors.

On 2 November, 1922, the defendants Ada G. Cates and her husband, Paul Cates, executed a deed, conveying to defendant J. R. Woolard the first tract of land described in said deed of trust, known as the La Barbe Summer Residence. This deed was duly recorded on 5 April, 1923; it was delivered on said day to said J. R. Woolard, who, upon delivery of same, paid the purchase price for said land to the said Ada G. Cates and her husband, his grantors. J. R. Woolard is a purchaser for value of said land; he relied in good faith upon the validity of the cancellation of the deed of trust from Ada G. Cates and her husband to Louis Breiling, as same appeared upon the record in the office of the register of deeds, at the time he paid the purchase price for said land to his grantors.

Upon the record of the deed of trust from Ada G. Cates and her husband to Louis Breiling, in the office of the register of deeds of Beaufort County, the following words and figures, stamped and written thereon, purporting to be a cancellation of said deed of trust, appear:

"Satisfaction of this mortgage or deed of trust is this day entered by me in pursuance of Revisal of 1905, section 1046.

"4-4-23.
G. RUMLEY,
J. L. M.,
Register of Deeds."

On 4 April, 1923, the day on which this entry was made on said record, G. Rumley was the register of deeds of Beaufort County; J. L. Morgan was his deputy. The entry was made on said record by N. L. Simmons, who used for that purpose a stamp, kept in his office by the register of deeds, for the cancellation of mortgages and deeds of trust, pursuant to the provisions of section 1046 of the Revisal of 1905 (now C. S., 2594, subsection 2), which is in the following words:

"2. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the State of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of 'satisfaction' on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was canceled."

The date and name of the register of deeds, as same appear upon the record, were written by the said N. L. Simmons. Neither G. Rumley, the register of deeds, nor J. L. Morgan, his deputy, authorized the said

N. L. Simmons to use said stamp, or to write the name "G. Rumley" or the initials "J. L. M." on said record. The said cancellation was not authorized by either of the plaintiffs; neither of them knew, until shortly before this action was begun, that said cancellation appeared upon the record.

The jury has found, in answer to the first issue, that the cancellation of the deed of trust from Ada G. Cates and her husband, to Louis Breiling, as same appears upon the record of said deed of trust, in the office of the register of deeds, was forged by N. L. Simmons. There was no allegation of any conduct on the part of plaintiffs, with respect to said cancellation, out of which any equities arise in favor of defendants M. U. Hodges or J. R. Woolard, and against the plaintiffs, or either of them.

Upon the verdict of the jury, and upon admissions of the parties, made during the trial, it was ordered and adjudged that plaintiff, Union Central Life Insurance Company, recover of defendant Paul Cates the sum of $1,693.52, with interest thereon from 1 November, 1923, this being the sum now due on the notes secured in said deed of trust. Summons had not been served on defendant Ada G. Cates; no judgment was therefore rendered against her.

It was further ordered, adjudged, and decreed that the cancellation appearing upon the record of the deed of trust from Ada G. Cates and her husband to Louis Breiling, on page 360, in Book 203, office of the register of deeds of Beaufort County, is null and void, and that plaintiffs, by virtue of said deed of trust, have a first lien upon the lands described therein.

It was further ordered, adjudged, and decreed that the said lands be sold by the commissioner named in said decree, and that out of the proceeds of the said sale the judgment rendered herein be paid. The commissioner was directed in said decree as follows:

"The said commissioner is hereby directed to first sell the tract of land described in said deed of trust as the second tract, and if said land shall fail to bring an amount sufficient to pay off and discharge this judgment, together with the costs, and the costs of sale, including commissions to the commissioner for his services, then the said commissioner is directed to sell the first tract of land described in said deed of trust. If said lands shall bring an amount more than sufficient to pay this judgment and the costs of sale, the commissioner is directed to pay the same into the hands of the clerk of the Superior Court of Beaufort County."

Defendant M. U. Hodges, upon his appeal to this Court, assigns as error the instruction of the court to the jury, with respect to the first issue. This instruction was in the following words:

"If you believe the evidence, and if you are satisfied that the evidence is clear, strong and convincing that Simmons forged the cancellation of the deed of trust, you will answer the first issue 'Yes'; if you are not so satisfied, you will answer it 'No.'"

Although we cannot approve the form of this instruction, we find no substantial error therein prejudicial to defendant. All the evidence tended to sustain the contention of plaintiffs that the issue should be answered in the affirmative. The jury so answered it. There was no evidence to the contrary. Only the credibility of the testimony and the probative force of the evidence were to be determined by the jury. The instruction, however, is erroneous in that plaintiffs are required thereby to establish the affirmative of the issue by evidence which the jury shall find is clear, strong, and convincing. In *Jones v. Coleman,* 188 N. C., 631, we said: "The affirmative of an issue involving only the question as to whether a written instrument has been executed, may be sustained by the greater weight or preponderance of the evidence; when, however, the execution of the instrument is admitted, and its integrity or legal effect is attacked, the party who carries the burden of the issue must establish his contention by evidence clear, strong, and convincing." The error, however, in imposing upon the plaintiffs a burden with respect to the quality of the evidence greater than that required by the law was not prejudicial to defendant. His assignment of error, based upon his exception to this instruction, is not sustained.

The defendant further assigns as error the instruction of the court to the jury upon the third issue. This instruction was as follows:

"If you believe the evidence, you will answer the third issue 'Yes.'"

The evidence was to the effect that the defendant J. R. Woolard entered into negotiations with Ada G. Cates and her husband for the purchase of the La Barbe Summer Residence, during the fall of 1922. These negotiations were conducted on the part of the defendants Cates by N. L. Simmons. An examination of the records, by the attorney of defendant J. R. Woolard, disclosed that the deed of trust from Ada G. Cates and her husband to Louis Breiling, then duly recorded, had not been canceled. N. L. Simmons, acting for the defendants Cates, agreed to procure the cancellation of the said deed of trust. The defendant Woolard, pursuant to an agreement with the said N. L. Simmons, delivered his check for $500 to his attorney as part payment of the purchase price for said land. This check was held by said attorney, pending the cancellation of the deed of trust, until 5 April, 1923. On said date this check, together with three notes, executed by the said Woolard, payable to Ada G. Cates, each for the sum of $500, was delivered by said attorney to Ada G. Cates. The cancellation of the deed of trust, purporting to have been made by the register of deeds, pursuant to the statute, was entered on the record on 4 April, 1923. Neither defendant Woolard nor his attorney had any notice that said cancellation had been forged by N. L. Simmons. The check for $500 was paid by the bank on which it was drawn on 5 April, 1923, or soon thereafter. The notes, given for the deferred payments on the purchase price of the land, have since been transferred to an innocent purchaser. The deed conveying the said land to J. R. Woolard was delivered to him shortly after it was recorded on 5 April, 1923. He went into possession of the land conveyed by the said deed immediately upon its delivery to him, and has since remained in possession of the same. We find no error in the instruction to the jury that if they believed the evidence, they should answer the third issue "Yes."

However, neither the defendant M. U. Hodges nor the defendant J. R. Woolard acquired any rights in or to the lands conveyed to him under his deed superior to the rights of plaintiffs, under the deed of trust, which was duly recorded prior to the conveyances to said defendants. The fact that the jury has found that each is a purchaser for value of the land described in his deed, without notice that the cancellation of the deed of trust, appearing on the record at the time he purchased the land conveyed to him, was a forgery, is immaterial, as affecting the rights of the plaintiffs. The cancellation is a nullity; it has no force or effect. The principle, applicable to the facts in this case, is stated in 41 C. J., at page 585, as follows:

"As between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith, and has dealt with the property by purchasing the title, or accepting a mortgage thereon as security for a loan, the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior. If, however, the owner of the mortgage is responsible for the mortgage being released of record, as when the entry of satisfaction is made possible by his own neglect, or misplaced confidence, or his own mistake, or where he is shown to have received actual satisfaction, or to have accepted the benefit of the transaction which resulted in the release, he will not be permitted to establish his lien to the detriment of one who has innocently dealt with the property in the belief that the mortgage was satisfied." This statement of the law is abundantly supported by authorities cited in the notes. In *Heyder v. Excelsior B. and L. Association,* 42 N. J. Eq., 403, 8 Atl., 310, 59 Am. R., 49, it is very justly said: "The security afforded by registry should remain undisturbed by a cancellation effected through mistake, accident, or fraud of third persons, even if by such cancellation subsequent mortgagees or purchasers are made to suffer loss. Such after-acquired rights ought not to prevail against the just claims of an innocent, nonnegligent incumbrancer, because the record has been wrongly effaced."

Defendant M. U. Hodges further contends that there is error in the judgment, in that the commissioner is therein directed to sell first the tract of land now owned by him, the same being the second tract described in the deed of trust, and not to sell the tract of land now owned by defendant J. R. Woolard, the same being the first tract described in the deed of trust, unless the second tract directed to be sold first shall fail to bring an amount sufficient for the payment in full of the judgment herein rendered.

The second tract, containing sixty acres, and known as the Stallings land, was first sold and conveyed by the grantors in the deed of trust. The first tract, containing seven acres, and known as the La Barbe Summer Residence, was retained by said grantors and subsequently sold and conveyed by them to the defendant J. R. Woolard. However, the grantee in the deed for the second tract, which was first conveyed by the grantors in the deed of trust, expressly assumed the payment of the indebtedness secured by the deed of trust, in part payment of the purchase price of the tract bought by him, and agreed to protect his grantors from all liability on account of said indebtedness, and thus cause the release of the La Barbe Summer Residence from the deed of trust. This agreement appears upon the face of the deed to Luke Jackson, which was duly recorded at the time J. R. Woolard purchased the La Barbe Summer Residence from Ada G. Cates and her husband. M. U. Hodges claims under this deed; he purchased the land with full notice from the record of said agreement.

In support of his contention, defendant relies upon the rule which is said to prevail in a majority of the states that as between successive purchasers of separate tracts of land, all of which are subject to a mortgage executed by their common grantor, the separate tracts, upon default of the mortgagor in the payment of the indebtedness secured by the mortgage, should be sold for the payment of said indebtedness in the inverse order in which they were conveyed, so that the tract last conveyed is primarily liable for the indebtedness, and must be sold before recourse can be had to the tract next in order. 41 C. J., 764. This rule is an exception to the general principle that equality is equity. It has no application, however, where the grantee of one of the separate tracts has assumed the payment of the entire indebtedness secured by the mortgage on all the tracts which have been subsequently conveyed to successive purchasers by the mortgagor.

In 18 R. C. L., at p. 475, it is said: "If the grantee of any parcel expressly assumes the payment of the lien, or agrees with the grantor that the part he buys shall be subject to the lien, and that the amount thereof shall be a part of the consideration for the portion he buys, equity will not interpose to protect him by subjecting the part of the premises remaining in the owner to be first sold. If the purchaser assumes the payment of the lien, the parcel thus purchased becomes, in the hands of the grantee and those holding under him, primarily chargeable with the lien debt as against the grantor, and consequently as against all subsequent grantees, or as against other parcels subsequently conveyed by the grantor."

The second tract described in the deed of trust was conveyed by the grantors therein to Luke Jackson upon his express agreement to pay off and discharge the indebtedness secured by the deed of trust in exoneration of the first tract, which was retained by said grantors, from the claims of the plaintiffs under the deed of trust; as between Ada G. Cates and her husband on the one hand and Luke Jackson on the other, the second tract was liable for the payment of the notes held by the plaintiff, the Union Central Life Insurance Company; the La Barbe Summer Residence was as between them released from the deed of trust.

Defendant M. U. Hodges is now the owner of the second tract, claiming under Luke Jackson; defendant J. R. Woolard is the owner of the first tract, claiming under Ada G. Cates and her husband. Both these defendants had notice from the records at the time the said tracts were conveyed to them, respectively, of the equity growing out of the agreement between their respective grantors. M. U. Hodges holds his title to the second tract subject to the equity of J. R. Woolard, as owner of the first tract, to have the second tract first sold for the payment of the judgment rendered herein, and in exoneration of the first tract from the claims of the plaintiffs by reason of the deed of trust.

The contention of the defendant M. U. Hodges that it was error to direct the commissioner to sell first the second tract of land, now owned by him, cannot be sustained. The judgment of the Superior Court is in accord with well settled principles, and must be affirmed. There is

No error.

JAMES CRUMP v. JOHN H. LOVE.

(Filed 30 March, 1927.)

1. Judgments—Estoppel—Res Adjudicata—Claim and Delivery—Possession—Injury to Property—Actions.

Where a judgment by default is rendered against the defendant in claim and delivery, without having submitted the issue of damages for the detention or deterioration of the property as prescribed by the statute, and thereafter the defendant has paid the plaintiff the amount of the debt, principal, interest and cost, and obtained the possession of the property, the judgment in claim and delivery is not *res adjudicata* in the defendant's later action against the former plaintiff to recover the damages alleged to have been caused the property by his negligent or wrongful use while in his possession.

2. Same—Insurer.

The plaintiff in possession of property under claim and delivery is practically liable as an insurer under the terms of his bond.

CIVIL ACTION, tried before *Sinclair, J.*, at Second January Term, 1926, of WAKE.

On 22 September, 1924, James Crump executed a note for $100, payable to G. E. Nicholson on 23 October, 1924. At the time of the issue of said note, Crump executed a chattel mortgage upon two horses to secure the same. The note and mortgage were duly transferred and assigned by Nicholson to John H. Love. Default having been made in the payment of said indebtedness, thereafter, on 4 March, 1926, John H. Love instituted an action in the city court of Raleigh, entitled "John H. Love, Assignee, v. James Crump," for the purpose of enforcing the collection of said note. The plaintiff Love seized the property described in said chattel mortgage under claim and delivery proceedings, and gave a bond in the penal sum of $600, conditioned as required by statute "for the return of the property of the defendant, with damages for its deterioration and detention, if such return is adjudged and can be had," etc. The defendant Crump, upon rendition of judgment against him, paid off the judgment on 28 April, 1926, including principal, interest, cost, and expense for keeping the horses. Thereafter Crump, the defendant in the former action, instituted the present action against John H. Love in May, 1926, alleging that one of the horses which had been seized in claim and delivery proceedings, and which had been returned to him upon settlement of the judgment in that proceeding, had been damaged by the defendant in this action, who was the plaintiff in the former action, by reason of the fact that the said Love, while in possession of said horse under said claim and delivery proceedings, knowing that said horse was a race horse and unfit for use as a draft animal, had, notwithstanding, worked said horse to a heavy lumber wagon, "and that by virtue of the defendant's knowingly, wrongfully, and unlawfully making use of said race horse as a draft horse, said horse has been irreparably damaged, and has been rendered unfit and useless as a race horse, to the great injury of the plaintiff," and that plaintiff did not ascertain the damage done to the animal until after he had received it back into his possession. The plaintiff alleges that he has been damaged in the sum of $450 by the unlawful and wrongful conduct of the defendant as aforesaid.

The defendant demurred to the complaint of the plaintiff in this action as follows: "The defendant demurs to the complaint filed in the above-entitled action, for that the said complaint does not upon its face state a cause of action in favor of the plaintiff against the defendant, for that:

"(a) Said complaint shows upon its face that all matters and things in controversy herein have been fully adjudicated in the city court of Raleigh, and said action is *res adjudicata.*

"(b) Said complaint shows upon its face that if any cause ever existed, the same has been fully compromised and settled between the parties thereto.

"Wherefore, defendant asks that this action be dismissed; that he go hence without day and recover his costs."

The demurrer was overruled by the judge of the city court of Raleigh, and thereupon the defendant appealed to the Superior Court of Wake County, and at the second term of the January Court, 1926, to wit, on 31 January, 1926, the judge of the Superior Court sustained the demurrer, and the plaintiff appealed.

Bunn & Arendell for plaintiff.
William B. Jones for defendant.

BROGDEN, J. If personal property is seized in a claim and delivery proceeding and final judgment rendered, and thereupon the owner of the property pays the judgment and the property is restored to him, can such owner maintain an action for damages for the impairment or deterioration of the property during the time it was so held by the adverse party?

When property is taken by a party in claim and delivery proceedings, he thereupon becomes practically an insurer under the terms of the bond required in such cases. *Randolph v. McGowans,* 174 N. C., 203; *Motor Co. v. Sands,* 186 N. C., 732. Therefore, the party holding the property must answer for its impairment or deterioration while in his custody.

In the case now under consideration, the defendant contends that the payment of the former judgment by the plaintiff in this action, who was the defendant in the former action, is an estoppel, or *res judicata,* and for this reason the plaintiff has no cause of action. The record discloses, in the former action of *Love v. Crump,* the judgment was a default judgment, decreeing that the plaintiff Love should take over and sell said horses at public auction according to law. No issue was submitted in the former action as to the present plaintiff's damages for the deterioration and detention of the property. Hence, no estoppel arises. *Hardison v. Everett,* 192 N. C., 374; *Whitaker v. Garren,* 167 N. C., 658; *Price v. Edwards,* 178 N. C., 493. Therefore, it necessarily follows that the plaintiff has stated a cause of action, and that the demurrer should have been overruled. *Woody v. Jordan,* 69 N. C., 189; *Asher v. Reizenstein,* 105 N. C., 213; *Bowen v. King,* 146 N. C., 389; *Moore v. Edwards,* 192 N. C., 446; *Polson v. Strickland, ante,* 300.

Indeed, the case of *Moore v. Edwards, supra,* is directly in point, and is determinative of this controversy. In that case, *Clarkson, J.,* speaking for the Court, said: "It will readily be seen by the issues and judgment in the former action of *Moore v. Mitchell,* that plenary issues were not submitted. The condition in the bond was 'with damages for its deterioration and detention, and the costs, if delivery can be had.' No issue was submitted, 'If delivery can be had, what were plaintiff's damages for deterioration and detention?' Under the issues and judgment, we cannot hold that in the present action the plea of estoppel, or *res judicata,* can avail defendant."

Reversed.

STATE AND GLOSSIE BRILEY v. WILLIE CARNEGIE.

(Filed 30 March, 1927.)

Bastardy—Principal and Surety—Appearance Bond—Appeal and Error.

The surety on the appearance bond of the defendant in bastardy proceedings appealed from a justice of the peace to the county court and there remanded for want of jurisdiction, may insist upon the exact terms of his bond; and where the defendant has been legally convicted and has served his term as the law provides on failing to pay the allowance made to the prosecutrix, costs, etc., the provisions in the appearance bond as to the surety's liability has been discharged. C. S., 267, 270; 3 C. S., 273.

APPEAL by defendant and surety, M. G. Duke, from *Sinclair, J.,* at October Term, 1926, of PITT. Reversed.

The controversy is succinctly stated in the State's brief, as follows:

"Proceedings in bastardy were taken out by Glossie Briley before Justice of the Peace John I. Smith. On the trial the justice of the peace found that the defendant Carnegie was the father of the child, and required him to pay Glossie Briley $100 and the costs of the action. The defendant appealed, and the papers were sent to the county court of Pitt County. On the matter being called to the attention of the judge of the county court, he, realizing that the appeal was improperly taken in his court, remanded the cause to John I. Smith, the justice of the peace who tried it, this on the ground that the statute creating said court, section 12, subsection (a), of chapter 681, Public-Local Laws of

1915, gave this court concurrent jurisdiction with the justice of the peace in all civil matters, actions, and proceedings 'which are now or may hereafter be given to justices of the peace of Pitt County.'

"It is manifest from this that in such civil actions there was no right of appeal to the county court, but the appeal must be taken directly to the Superior Court. When the cause came up for hearing again before John I. Smith, justice of the peace, Carnegie withdrew the appeal, and he was committed to jail until allowance and cost in the cause were paid. Motion was then made by the plaintiff for judgment on the original bond, given at the time that the appeal was taken to the county court. This motion was denied by the justice of the peace, and the plaintiff appealed to the Superior Court. In the Superior Court his Honor, Judge Sinclair, reversed the ruling of the justice of the peace, and entered up judgment against the surety of Carnegie, M. G. Duke. This bond is in the usual form of such bond provided in Simms' Manual of Law and Forms, p. 551 of 1924 edition. His Honor places his judgment upon the terms used in the bond: 'And abide by and perform the order of the court.' The contention of the defendant was that he did abide by and perform the order of the county court, which remanded the case to the justice of the peace, and he did appear before the justice of the peace; consequently, all the conditions of this recognizance on this appeal in bastardy has been conformed to."

The material part of the bond given is as follows:

"We, M. G. Duke and Willie Carnegie, of said county, acknowledge ourselves bound to the State of North Carolina in the sum of one hundred and twenty-five dollars. The condition of this obligation is such that if the said Willie Carnegie *shall personally appear at the next term of county court to be held in and for the county of Pitt, on the second Monday in March next, and to abide by and perform the order of the court, then and there to answer a charge preferred against Willie Carnegie for bastardy*, then this obligation to be null and void; otherwise, to remain in full force and effect. M. G. Duke (Seal), Willie Carnegie (Seal)."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Julius Brown for Glossie Briley.

J. C. Lanier for M. G. Duke, bondsman.

CLARKSON, J. The State's brief says, "Upon this statement of facts, we submit the case to the Court."

"Bastardy proceedings are civil and not criminal in their nature, and are intended merely for the enforcement of a police regulation." *Richardson v. Egerton,* 186 N. C., p. 291.

3 C. S., 273, is as follows: "When the issue of paternity is found against the putative father, or when he admits the paternity, the judge or justice shall make an allowance to the woman not exceeding the sum of two hundred dollars, to be paid in such installments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed by law; and in default of such payment he shall be committed to prison."

C. S., 270, is as follows: "When an appeal is taken, the justice shall recognize the person accused of being the father of the child with sufficient surety for his appearance at the next term of the Superior Court for the county, and to abide by and perform the order of the court. The justice shall also recognize the woman and other witnesses to appear at the Superior Court, and shall return to the court the original papers in the proceeding and a transcript of his proceedings as required in other cases of appeal. If the putative father fails to appear, unless for good cause shown, the judge shall direct the issue of paternity to be tried. If the issue is found against the person accused, he shall order a capias or attachment to be issued for the father, and may also enter up judgment against the father and his surety on his recognizance."

North Carolina Manual of Law and Forms (Simms, 8th ed., 1924), No. 155, is a form of bond with surety payable to State to maintain the child and indemnify county. C. S., 267. No. 156 is a form of a bond with surety for maintenance or allowance to mother or child, not exceeding $200. C. S., 273, *supra*. No. 157 is a form of bond with surety payable to State on appeal in bastardy, and is practically the same language as used in the bond in the present case, "and to abide by and perform the order of the court," etc. C. S., 270, *supra*.

In the present case, Willie Carnegie appeared at the county court, and complied with the bond in accordance with its exact terms. The case was remanded to the justice of the peace, and he appeared there, and was committed to jail until allowance and cost was paid. The bond, in accordance with its precise terms, has been fully complied with. Willie Carnegie was committed to jail, paying the price for his wrongful conduct.

In *Ins. Co. v. Durham,* 190 N. C., p. 61, this Court, speaking to the question, and citing a wealth of authorities, said: "The contract, as written, and not otherwise, fixes the rights and determines the liability of the surety. Sureties have a right to stand on the terms of their contract, and, having consented to be bound to the extent expressed therein, their liability must be found therein and strictly construed."

For the reasons given, the judgment of the court below is

Reversed.

NATIONAL BANK OF SUFFOLK v. A. R. WINSLOW.

(Filed 30 March, 1927.)

1. **Negotiable Instruments—Contracts, Written—Evidence — Parol Evidence—Notice—Equities.**

   A bank discounting a note with notice that the payee has on hand merchandise of the maker which was to be sold for the payment of the note, takes the note subject to this particular mode of payment, and parol evidence of this agreement in the holder's action thereon against the maker is not contrary to the rule of evidence, that a written instrument may not be varied, altered or contradicted by parol.

2. **Same—Knowledge.**

   The holder of a negotiable instrument by endorsement, with knowledge of the maker's equities against the payee as to the particular method of payment, and who has thus purchased the paper, takes subject to the equities existing between the original parties.

3. **Same—"Set-Off."**

   Where the holder of a negotiable instrument given by the maker containing the words "without off-set," takes with knowledge that it is to be paid out of the proceeds of sale of the maker's property in the hands of the payee, and thus subject to the equities of the maker, the words "without off-set" taken in their proper significance, does not relieve the holder of his obligation to recognize the equities of the maker as to the particular manner in which the instrument should be paid.

CIVIL ACTION, tried before *Grady, J.*, at August Special Term, 1926, of PERQUIMANS.

The evidence tended to show that the defendant was engaged in buying and raising peanuts in Perquimans County. In the fall of 1921 the defendant made an agreement with T. H. Birdsong, trading as Birdsong Storage Company, that the defendant was to ship the said Birdsong peanuts raised and purchased by him, and the said Birdsong was to handle said peanuts on a commission basis. It was further agreed that as the defendant should ship peanuts to Birdsong, he would draw drafts on Birdsong, or the Birdsong Storage Company, for sixty-five or seventy-five per cent of the cost of the peanuts so shipped and delivered. Prior to 16 November, 1921, the defendant drew a draft for $8,000 on Birdsong, which he deposited in a bank at Hertford, and this draft came into the possession of the plaintiff. There was delay in paying the draft, and the defendant went to Suffolk to see Birdsong, and Birdsong and the defendant went to the plaintiff bank to make inquiry about said draft. At that time Birdsong was an inactive vice-president of plaintiff bank. The defendant and Birdsong went into the plaintiff bank and

Mr. Woolford, cashier, stated to them that the plaintiff had the draft, and Birdsong requested the cashier to pay the draft, but was informed by the cashier, "I cannot pay that draft that way. If I pay that draft, I must charge it to somebody, or must have some consideration for it." Thereupon Birdsong suggested to the defendant that the defendant give a note for $8,000, the amount of the draft, payable to the Birdsong Storage Company. At the time of this conversation, the cashier of the plaintiff was sitting at his desk eight or ten feet from where this conversation took place. The defendant executed the note, and Birdsong duly endorsed it and handed it to the cashier, stating: "I am going to pay it right away out of my own money or out of Mr. Winslow's peanuts." Mr. Woolford said, "Mr. Birdsong, that is all right. I don't know Mr. Winslow; I don't know whether he is responsible or not, and I shall look to you for the money." Plaintiff said: "You gentlemen don't have to have my word for my responsibility—Mr. Birdsong has my responsibility with him." Birdsong told Woolford: "I am the man to pay it. I have Mr. Winslow's peanuts, plenty to pay it two or three times over." That he would either pay the note himself or sell these two thousand bags right then, in a few days. *He told Mr. Woolford that he and I had agreed that the note should be paid out of the peanuts.* He said he would sell the peas and pay it himself." The defendant was a stranger to the officials of the bank.

The evidence tended to show further that the defendant had shipped to Birdsong about twenty cars of peanuts, which, at the market price, would have paid off and discharged all of defendant's indebtedness and left a large sum in excess thereof. Upon delivery of the note so made by the defendant and endorsed by said Birdsong, the plaintiff bank paid the $8,000 draft. The note was in words and figures as follows: "$8,000.00. Suffolk, Va., 16 November, 1921. On demand............days after date, I promise to pay to Birdsong Storage Company, or order, negotiable and payable without offset at the National Bank of Suffolk, Suffolk, Va., eight thousand and no/100 dollars, for value received, with ten per cent, for cost of collection; and it is agreed upon by the parties that the interest on this note shall be payable in advance, and we, principal and endorsers, hereby waive the benefit of our homestead exemption as to this debt. (Signed) A. R. Winslow, Winfall, N. C."

Birdsong paid the interest on the note and $2,000 on the principal, but upon failure to pay the balance, the plaintiff instituted this action against the defendant, Birdsong not being a party to the suit.

The issues and the answers of the jury thereto were as follows:

1. At the time of the execution of the $8,000 note, was it understood and agreed between A. R. Winslow and the Birdsong Storage Company

that said note was to be paid from the sale of peanuts then in the possession of said Birdsong Storage Company, belonging to A. R. Winslow? Answer: Yes.

2. If so, did the National Bank of Suffolk have actual notice of said agreement at the time said note was endorsed to it by said Birdsong Storage Company? Answer: Yes.

3. Did the defendant Winslow have with the said Birdsong Storage Company a sufficient amount of peanuts to pay said note? Answer: Yes.

4. In what amount, if anything, is the defendant indebted to the plaintiff on account of said note? Answer: Nothing.

Judgment was entered upon the verdict in favor of defendant, and the plaintiff appealed.

Ehringhaus & Hall for plaintiff.
McMullan & Leroy for defendant.

BROGDEN, J. Three questions of law arise upon the evidence:

1. In an action between the holder and the maker of a negotiable instrument, is parol evidence admissible to establish an agreement between the maker and the payee creating a particular mode of payment?

2. If so, does an endorsee taking such note, with actual knowledge of the agreement, hold it subject to the maker's equities arising on said agreement?

3. What is the effect of the words "without offset" contained in the note in controversy?

The reason for excluding parol evidence, tending to establish a collateral agreement, as a part of a negotiable instrument, is that such evidence would contradict or vary the written instrument. The law is firmly established that parol evidence is inadmissible to contradict or vary the terms of a negotiable instrument, but this rule does not apply to a parol agreement made contemporaneously with the writing providing a mode of payment. This rule rests upon the theory that a contract may consist of both written and unwritten terms, and if the unwritten portion does not actually vary or contradict the written portion, the whole contract will be received in evidence. The rule is thus stated in *Evans v. Freeman,* 142 N. C., 62: "The competency of such evidence for the purpose of establishing the other and unwritten part of the contract, or even of showing a collateral agreement made contemporaneously with the execution of the writing, has been thoroughly settled by the decisions of this Court. Indeed, it seems to us that the very question we are now considering has been passed upon by this Court several times. Applying the rule we have laid down, it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars."

In Brown on Parol Evidence, sec. 117, it is held that "parol evidence is admissible to show an agreed mode of payment and discharge other than that specified in the bond." And in *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, it was held that when a promissory note is given, payable in money, parol evidence may be received tending to establish as a part of the contract a contemporaneous agreement that a different method of payment should be accepted. *Carrington v. Waff,* 112 N. C., 116; *Quinn v. Sexton,* 125 N. C., 447; *Martin v. Mask,* 158 N. C., 436; *Mfg. Co. v. Mfg. Co.,* 161 N. C., 431; *Pierce v. Cobb,* 161 N. C., 300; *Hunter v. Sherron,* 176 N. C., 226.

The jury has found from competent evidence that the plaintiff had "actual notice of said agreement at the time said note was endorsed to it by said Birdsong Storage Company." Therefore, the plaintiff held the note subject to the terms of the agreement and equities therein created. *Kerchner v. McRae,* 80 N. C., 219; *Carrington v. Waff,* 112 N. C., 116; *Evans v. Freeman,* 142 N. C., 62.

The note in controversy contained the language "negotiable and payable without offset at the National Bank of Suffolk." The plaintiff contends that the words "without offset" inserted in this instrument prevents the application of the rule declared in *Evans v. Freeman, supra,* for the reason that it amounted to a declaration by the maker, the defendant in this action, that he would not plead a set-off or counterclaim to said note. It therefore becomes necessary to determine whether or not the defense interposed by the defendant is or constitutes an offset or a set-off as contemplated by law. Set-off has been defined to be "a mode of defense whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own to counter-balance it, either in whole or in part. Technically speaking, a set-off is a counter-demand which the defendant holds against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action." Waterman on Set-off, Recoupment and Counter-claim, secs. 1 and 2.

The first case in our own State to define a set-off is *McDowell v. Tate,* 12 N. C., 249, and the definition is as follows: "A set-off is a mutual independent claim, which still continues to exist as such, and one which the parties did not intend should be appropriated to the satisfaction of an existing demand, but that each should have mutual causes of action, and of course mutual actions, if they pleased, against each other."

Again, in *Hurst v. Everett,* 91 N. C., 399, a set-off is thus defined: "A set-off, as originally provided by statute, was the right of a defendant when sued for a debt to counter-balance it, in whole or in part, by setting up as a defense a demand of his own against the plaintiff."

As defined and interpreted by the decisions, a set-off applies only to mutual independent claims between the parties, and must arise out of a transaction extrinsic to the cause of action asserted by the plaintiff. It is not such a demand as can be made the subject of affirmative relief, and this constitutes the distinction between a counter-claim proper and a set-off. *Electric Co. v. Williams,* 123 N. C., 51; *Smith v. French,* 141 N. C., 6; *Sewing Machine Co. v. Burger,* 181 N. C., 241; *Williams v. Williams,* 192 N. C., 405.

Applying the principles of law deduced from the authorities to the facts of this case, it would seem apparent that the collateral agreement relied upon by the defendant as a defense to the action cannot be deemed or considered an offset as defined by the courts. The defense, by a fair interpretation, partakes more of the nature of payment than of offset. "A payment is, by consent of the parties, either express or implied, appropriated to the discharge of a debt." *McDowell v. Tate, supra; Suggs v. Watson,* 101 N. C., 188.

The jury has found that the agreement was made as alleged by the defendant; that the plaintiff had actual notice of the agreement, and that at the time the note in controversy was delivered to the plaintiff in accordance with the terms of the agreement that the Birdsong Storage Company had a sufficient amount of peanuts on hand belonging to the defendant to pay the note.

We therefore conclude that the case has been properly tried, and that the judgment as rendered should be affirmed.

No error.

RUBY R. SWINDELL v. B. H. STEPHENS ET AL.

(Filed 30 March, 1927.)

Mortgages—Cancellation—Forgery—Registration—Liens.

As against the mortgagee of a third mortgage given on the same lands to secure borrowed money, the wrongful cancellation by a forged entry on the margin in the registration book is a nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been canceled of record. C. S., 2594(2).

APPEAL by defendant North Carolina Joint-Stock Land Bank from *Nunn, J.,* at October Term, 1926, of BEAUFORT. Affirmed.

Action to have cancellation of deed of trust, appearing on the record in the office of the register of deeds of Beaufort County, declared null and void, on the ground that same is a forgery, and for decree of foreclosure of said deed of trust.

From judgment upon statement of agreed facts, defendant, North Carolina Joint-Stock Land Bank, appealed to the Supreme Court.

L. C. Warren and H. C. Carter for plaintiff.

Ward & Grimes for defendant A. W. Baker.

Allen & Duncan and Harry McMullan for defendant N. C. Joint-Stock Land Bank.

CONNOR, J. Plaintiff, Ruby R. Swindell, is now the holder in due course of four notes, executed by B. H. Stephens, and payable to the order of W. H. Hooker, A. W. Baker, and N. L. Simmons, trustee. Those notes, endorsed by the payees named therein, were transferred, before maturity, to the plaintiff, as collateral security for a note executed by the Washington-Beaufort Land Company, payable to plaintiff, which is now due and unpaid. They are secured by a deed of trust, executed by B. H. Stephens to W. L. Vaughn, trustee, dated 15 January, 1920. The land conveyed by said deed of trust is situate in Beaufort County; the deed of trust is duly recorded in the office of the register of deeds of said county. In the spring of 1923, an entry was made upon the record in the office of the register of deeds purporting to be a cancellation of the deed of trust from Stephens to Vaughn, trustee, by the register of deeds of Beaufort County, under the provisions of the Revisal of 1905, section 1046 (now C. S., 2594, subsec. 2). This cancellation is a forgery; it was not entered by the register of deeds or by his deputy. It was entered by N. L. Simmons without the knowledge or consent of the register of deeds or of his deputy. At the date of the said forged cancellation, the plaintiff was in possession of said deed of trust, and of the notes secured thereby; she had no knowledge that said deed of trust had been canceled upon the record until November, 1924. This action was begun on 23 January, 1925.

Subsequent to the registration of his said deed of trust to W. L. Vaughn, trustee, B. H. Stephens conveyed the land described therein to the Washington-Beaufort Land Company, by deed dated 21 November, 1921. Thereafter, by deed dated 14 January, 1922, the Washington-Beaufort Land Company conveyed the said land, together with other lands, to Frank Cuthrell. Both said deeds were duly recorded in the office of the register of deeds of Beaufort County.

At the date of the execution of the deed to him by said land company, Frank Cuthrell executed a deed of trust, by which he conveyed to W. L. Vaughn, trustee, the land conveyed to him by said land company to secure the payment of his note to the said land company, aggregating the sum of $6,000. This deed of trust was duly recorded in the office of the register of deeds of Beaufort County. On 20 February, 1923, the Washington-Beaufort Land Company transferred to J. H. Howard, as collateral security for its note to the said Howard, in the sum of $3,500, the deed of trust from Frank Cuthrell to W. L. Vaughn, trustee, together with duplicates of the notes secured therein, which N. L. Simmons, president of said land company, had procured by fraudulent representations from Frank Cuthrell. Thereafter, the register of deeds of Beaufort County, without the consent of J. H. Howard, or of W. L. Vaughn, trustee, canceled the deed of trust from Frank Cuthrell to W. L. Vaughn, trustee, by an entry on the record of same in the following words:

> "The original of this instrument, together with the notes secured thereby having been presented to the undersigned marked 'Fully paid and satisfied' by the mortgagee, I hereby cancel the same of record under and by virtue of authority contained in paragraph 2, section 2594, of the Consolidated Statutes of North Carolina. This 25 October, 1923.
>
> G. RUMLEY,
> *Register of Deeds.*"

On 27 June, 1923, Frank Cuthrell executed a deed of trust, by which he conveyed to defendant First National Trust Company, trustee, the land described in the deed of trust from B. H. Stephens to W. L. Vaughn, trustee, and subsequently conveyed to him by the Washington-Beaufort Land Company to secure his note for $3,000, payable to the order of the North Carolina Joint-Stock Land Bank. This deed of trust was duly recorded in the office of the register of deeds of Beaufort County on 10 August, 1923. The note secured in said deed of trust is now due and unpaid.

Neither the First National Trust Company nor the North Carolina Joint-Stock Land Bank had actual notice, at the time of the execution of the deed of trust by Frank Cuthrell, or at the time the loan, evidenced by this note secured therein, was made, that the cancellation of the deed of trust from B. H. Stephens to W. L. Vaughn, trustee, was a forgery, or that there was any irregularity in the cancellation of the deed of trust from Frank Cuthrell to W. L. Vaughn, trustee. Each relied, in good faith, upon the record in the office of the register of deeds of Beaufort County, showing that both said deeds of trust had been canceled in accordance with the provisions of the statute.

Upon consideration of the facts agreed, it was considered and adjudged by the court:

1. That the cancellation of the deed of trust executed by B. H. Stephens to W. L. Vaughn, trustee, securing the notes now held by plaintiff, is void and of no effect, for that same is a forgery; and that plaintiff has the first lien upon the lands described in said deed of trust for the amount due upon the notes secured therein, now owned by her.

2. That the cancellation of the deed of trust executed by Frank Cuthrell to W. L. Vaughn, trustee, securing the notes recited therein, duplicates of which are held by J. H. Howard, is a valid discharge of the land described therein, from said deed of trust, in so far as the North Carolina Joint-Stock Land Bank is concerned.

It was further ordered and decreed that the land described in the deed of trust from B. H. Stephens to W. L. Vaughn, trustee, be sold by commissioners appointed in said decree, and that out of the proceeds of said sale, the commissioners, after paying the costs of the sale, and taxes due upon said land, pay to plaintiff amount of the judgment rendered in her behalf against the maker and endorsers of the notes held by her; and that the balance, if any, remaining in their hands be paid by them to the clerk of the Superior Court of Beaufort County, to be held by him subject to further orders of the court.

The exception of defendant North Carolina Joint-Stock Land Bank to the judgment cannot be sustained.

It is agreed that the cancellation of the deed of trust from Stephens to Vaughn, trustee, is a forgery. It is therefore void and of no effect. *Ins. Co. v. Cates, ante,* 456.

It is further agreed that the cancellation of the deed of trust from Cuthrell to Vaughn, trustee, was entered on the record by the register of deeds, who was authorized by statute to cancel the deed of trust, upon the exhibition to him of the deed of trust, with the notes secured thereby, endorsed by the trustee, in the deed of trust, or by the payee of the notes secured thereby, "Paid and satisfied." This cancellation, as same appears upon the record, is regular in all respects; it is a discharge of the land from the lien of the deed of trust, certainly in so far as the North Carolina Joint-Stock Land Bank is concerned. *Guano Co. v. Walston,* 187 N. C., 667.

Defendant's sole assignment of error, based upon its exception to the judgment, is not sustained. The judgment is

Affirmed.

J. C. CARTER AND WIFE, ROSE CARTER, v. J. W. OXENDINE.

(Filed 6 April, 1927.)

1. **Husband and Wife—Estates—Entireties—Gift—Parol Trusts—Trusts—Deeds and Conveyances.**

   Where a husband pays for lands and has a deed therefor made to the wife, the law presumes that he has made a gift to her of the lands so conveyed.

2. **Same—Statutes—Separate Examination of Wife—Probate.**

   Our Constitution and statute require of a conveyance of lands by the wife, for her protection, that her written consent and privy examination be taken, and a parol trust in lands purchased with her own money, or partly so purchased, cannot be engrafted on a deed, made subsequently, at her request by the seller to her and her husband, or create an estate by entireties so that the estate surviving to the husband will descend to his heirs at law.

CIVIL ACTION, before *Midyette, J.,* at December Term, 1926, of ROBESON.

The evidence tended to show that prior to 1915 Joseph W. Oxendine and Ruth E. Oxendine, his wife, owned about 66 35/100 acres of land; 25 1/4 acres of this land was the property of Joseph W. Oxendine, the husband, through inheritance from his ancestors. The wife, Ruth E. Oxendine, was the owner of 41 1/10 acres of said land, the purchase money for which had been paid from the joint earnings of the family and deed made to her.

The plaintiff, John Carter, is the son of Ruth E. Oxendine, and was born before her marriage to the defendant. The defendant had one son, Joseph W. Oxendine, Jr., by his first wife. Defendant and his wife, Ruth, had no children born of their marriage.

John Carter and his wife and Ruth E. Oxendine and her husband, Joseph Oxendine, lived together as one family, and being desirous of acquiring a tract of land upon an improved highway, they sold the 66-acre tract and purchased with the proceeds thereof 115 acres of land lying on both sides of the hard-surface road running to Pembroke. The sale of the land and the purchase of the tract on an improved highway was negotiated by C. M. Barker. The sale and purchase constituted one transaction, and all papers bore the same date. Barker testified that Ruth Oxendine said to him that "she and the defendant were getting old, and said they had worked hard, and that she wanted these deeds made so it would protect or give her and the defendant a home. Said if they could get the deeds made where they would be protected with a home, or guarantee them a home, or something to that effect, that she would make the deed for her land and take this over." I said, "Ruth, I will tell you what I will do. We will make the deed to the right-hand side of the road to you and Carter's wife," and I says, "You and Carter's wife will not have to sign the mortgage upon the land on the left-hand side of the road." She said, "Jodie (meaning the defendant) and myself have worked hard and gotten old. I want to have the deeds made in a way by which it would give us a home." . . . "She was an intelligent woman, and the reason that was done was to protect a home, as she said, for both of them. She went further then and said John and wife (plaintiffs) had worked hard, not only for her and the defendant, but for themselves. I told her the wives would not have to sign the mortgage. Mortgage was given on the lands on the opposite side of the road, which had been conveyed to the men." In accordance with this conversation, deed for 53 1/2 acres of land was made to Ruth Oxendine and Rosaline or Rose Carter jointly for all the land on the right-hand side of the improved highway, and a deed to the land on the left-hand side of the highway was executed to the defendant, Joseph W. Oxendine, and the plaintiff, John Carter. The defendant, Joseph W. Oxendine, and the plaintiff, John Carter, executed a mortgage for $1,500 for the balance of the purchase price on the tract so conveyed to them. This mortgage has been paid. Ruth Oxendine died intestate about the year 1925. The plaintiff, John Carter, claims a one-half interest in the 53 1/2-acre tract on the right-hand side of the road as heir at law of his mother, Ruth Oxendine. The defendant, the husband of Ruth Oxendine, deceased, claims the half-interest in said land by reason of what he alleges was a parol trust impressed upon said land by Ruth Oxendine at the time the deed was made to her and Rosaline Carter.

At the conclusion of the evidence, the trial judge sustained a motion to dismiss the defendant's cause of action as upon nonsuit, and signed judgment decreeing that the plaintiffs are the legal owners and entitled to the possession of the half interest of Ruth Oxendine in and to said tract of land, from which judgment the defendant appealed.

Varser, Lawrence, Proctor & McIntyre for plaintiffs.
T. A. McNeill and Johnson, Johnson & McLeod for defendant.

BROGDEN, J. Can a married woman create a parol trust in her land in favor of her husband?

The defendant alleged as a defense to the action instituted by the plaintiffs that the communication between Ruth E. Oxendine and Barker constituted a trust in favor of defendant. The allegation of the answer asserting this defense is as follows: "That at and prior to the time the land set forth and described in paragraph one of the complaint were purchased, a parol agreement was entered into between the defendant, Joseph W. Oxendine, and his wife, Ruth E. Oxendine, to the effect that the lands described in the complaint would be purchased and held as a home for the said parties, the same not to be mortgaged or encumbered, but to belong to the said Joseph W. Oxendine and wife, Ruth E. Oxendine, and owned by them as a permanent home. . . . That by virtue of said understanding and agreement the said property became and was the property of Joseph W. Oxendine and wife, Ruth E. Oxendine, and that it amounted to tenancy by the entirety, and that upon the death of said Ruth E. Oxendine, the said property, by virtue of the understanding and agreement between the parties, vested absolutely in the defendant, Joseph W. Oxendine, and that *by virtue of said parol trust agreement* the said Joseph W. Oxendine is now the owner of said property in fee simple."

The defendants, in their brief, assert that: "It is not contended by the defendant in this case that there is any resulting trust in his favor." So that the naked question presented is whether the wife, in the light of the evidence, created a parol trust in said land in favor of her husband, or that she held her half interest in said land as a tenant by the entirety. There is no allegation of mistake of the parties or of the draftsman of said deed, and no correction or reformation thereof is sought in this action.

It is thoroughly established by law in this State that if a husband conveys land to his wife, or procures the title to be made to her by another, that the law presumes it is a gift to the wife. *Singleton v. Cherry,* 168 N. C., 402; *Nelson v. Nelson,* 176 N. C., 191; *Tire Co. v. Lester,* 190 N. C., 416.

The facts, in their final analysis, present a situation in which the wife, with her own money, seeks to purchase land, and, while the deed is made to her, she undertakes to impress upon the title a parol trust in favor of her husband in the event he should survive her. The rule relating to the creation of a parol trust by a married woman in favor of her husband is thus expressed in Mordecai's Law Lectures, vol. 2, p. 1067: "A *feme covert* cannot create a parol trust in land, for to permit such a thing would be a subterfuge to evade the Constitution and statutes made for her protection. However, this rule may apply to her own property only, and not to property in which she has no beneficial interest. To create a trust in land is, in effect, the conveyance of an interest therein; and in order to convey an interest in her land the written consent of the husband, as required by the Constitution and statute, and her private examination as required by the statutes, are essential." *Farthing v. Shields,* 106 N. C., 289; *Thurber v. LaRoque,* 105 N. C., 301; *Ricks v. Wilson,* 154 N. C., 287.

The defendants rely upon the cases of *Ray v. Long,* 132 N. C., 891, and *Murchison v. Fogleman,* 165 N. C., 397. In both of these cases the title was taken in the name of the husband, although the purchase money in both instances was paid jointly by the husband and the wife. Under these circumstances the Court held that the wife could enforce her equity against her husband, but, as we interpret the decisions, they do not sustain the position that the husband could enforce a like equity against the wife under the circumstances as disclosed by the facts. As the money which Ruth E. Oxendine paid for the land belonged to her, even though the deed had been made to her and her husband, at her request, constituting an estate by entirety, still the husband could not retain the land by survivorship for the reason that "if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman, she is presumed to have acted under the coercion of her husband." *Clark, C. J.,* in *Deese v. Deese,* 176 N. C., 527; *Sprinkle v. Spainhour,* 149 N. C., 223; *Speas v. Woodhouse,* 162 N. C., 69; *Crocker v. Vann,* 192 N. C., 422; *Garris v. Tripp,* 192 N. C., 211.

We are therefore of the opinion, under all the facts disclosed in the record, that the judgment was correct and should be upheld.

Affirmed.

R. A. TURLINGTON AND H. J. TURLINGTON, ADMINISTRATORS OF RICHARD C. TURLINGTON, v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 6 April, 1927.)

1. **Insurance, Life—Policies—Applications—Stipulations.**

A stipulation in the application for a policy of life insurance that the policy applied for will only be valid if the application is accepted by the insurer and delivered while the applicant is alive, and the first premium thereon paid, is a reasonable one, and valid.

2. **Same—Death of Insured Prior to Delivery of Policy.**

When the local agent of a life insurance company has received an application for insurance, stipulating in effect, among other things, that it would not be enforceable unless delivered to the applicant in his life, and when the local agent received the policy applied for, he returned it to the company on account of the death of the applicant, no delivery has been made that would give effect to the proposed policy contract.

3. **Same—Principal and Agent—Payment of Premium—Implied Authority.**

An undisclosed agreement, made between the agent of one applying for a policy of life insurance and the local agent of the company, that a credit would be given for professional services personally owed by the local agent of the insurer to the agent of the applicant, the latter's son, and which was so given at the time of the application for the policy, covering full payment of the premium, is not binding upon the insurer, unless acquiesced in by it.

4. Same—Ratification—Premium Notice.

Where a local agent of a life insurance company has received a credit on his own personal account for the premium to become due on the insurer's acceptance of an application for life insurance, the fact that the insurer without notice or knowledge of this fact sent the applicant a notice of a second payment to become due if the policy were alive and in force is not a ratification of the unauthorized act of the local agent.

APPEAL by defendant from *Cranmer, J.*, at October Term, 1926, of WAYNE. Reversed.

Action upon policy of life insurance. Defendant denies liability under the policy alleged to have been issued by defendant upon the life of Richard C. Turlington; it alleges that it has never issued any policy of insurance upon the life of the said Richard C. Turlington, and that it is not liable as an insurer of his life, by reason of his application to defendant for a policy of insurance upon his life.

On 2 February, 1924, Richard C. Turlington signed an application to defendant for a policy of insurance upon his life, in the sum of $1,000, payable at his death to his estate. He died on 9 February, 1924.

Plaintiffs allege that at the date of said application, the first quarterly premium on the policy applied for was paid by Dr. R. S. Turlington, a son of Richard C. Turlington, the applicant; and that said application was thereafter received, approved, and accepted by defendant, at its home office in New York City, prior to the death of Richard C. Turlington. Plaintiffs contend that by reason of said payment, and of the acceptance of said application, during the lifetime of Richard C. Turlington, defendant is liable to them for the amount of the policy applied for by Richard C. Turlington.

Defendant denies each of these allegations. It alleges that it did not approve and accept said application until after the death of Richard C. Turlington. It contends that it is not liable to plaintiffs on account of such acceptance by it of the application for a policy of insurance upon the life of said Richard C. Turlington.

The only issue submitted to the jury was answered as follows:

"Is the defendant indebted to plaintiffs, and if so, in what amount? Answer: '$1,000.' "

From judgment on this verdict, defendant appealed to the Supreme Court.

D. H. Bland for plaintiffs.

Dawson & Jones and Langston, Allen & Taylor for defendant.

CONNOR, J. On 2 February, 1924, Richard C. Turlington signed, at Goldsboro, N. C., an application to defendant for a policy of insurance on his life, in the sum of $1,000, payable to his estate.

This application was forwarded promptly by defendant's agent at Goldsboro, N. C., to defendant, at its home office in New York City. It was approved and accepted by defendant on 15 February, 1924. A policy of insurance, in accordance with said application, dated 15 February, 1924, was thereupon sent by defendant, through the mail, to defendant's agent at Goldsboro, N. C., to be delivered to Richard C. Turlington by said agent upon payment of the first quarterly premium, as stipulated in said policy. The agent at Goldsboro received said policy; having learned that Richard C. Turlington had died on 9 February, 1924, the said agent returned the policy to defendant. It was not issued and delivered to Richard C. Turlington, or to anyone for him, during his lifetime; nor was the premium as stipulated in the policy ever paid to defendant by Richard C. Turlington, or by anyone for him.

All the evidence offered at the trial, with respect to the issuance and delivery of the policy upon which plaintiffs seek to recover in this action, tends to establish the facts to be as above stated; upon these facts plaintiff cannot recover upon the policy. It is expressly stipulated in the application therefor "that the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the applicant." This is a valid stipulation; plaintiffs, having failed to show by the evidence that the policy sued on was issued and delivered during the lifetime of Richard C. Turlington, cannot recover thereon. *Ross v. Ins. Co.,* 124 N. C., 395.

Upon their allegations that the first quarterly premium on the policy applied for by Richard C. Turlington was paid by his son, Dr. C. S. Turlington, at the time said application was signed, and that said application was approved and accepted by defendant prior to the death of Richard C. Turlington, plaintiffs contend that defendant is liable to them for the amount of the policy applied for, notwithstanding such policy was not issued and delivered during the lifetime of Richard C. Turlington.

The evidence offered by plaintiffs in support of their allegation that the premium was paid at the date of the application tends to show that on 2 February, 1924, the date of the application, Dr. C. S. Turlington, a son of the applicant, credited his account for professional services rendered to the agent of defendant, who solicited said insurance, with the amount of the first quarterly premium on the policy applied for by Richard C. Turlington; that this credit was given upon an express agreement between the said agent and Dr. Turlington, approved by Richard C. Turlington, that the first premium on the policy applied for should thereby be paid in advance, and that if the application was approved and accepted by defendant, the policy issued pursuant thereto should be in full force and effect from and after 2 February, 1924.

No evidence was offered, however, by plaintiffs tending to show that the agent was authorized by defendant to accept a credit upon his individual indebtedness in payment of the premium on the policy applied for by Richard C. Turlington and to be issued by defendant, upon its approval and acceptance of the application. An agent for an insurance company has no implied authority from his principal to accept a credit upon his individual indebtedness to an applicant for a policy of insurance, or to anyone else, in payment of the premium on the policy applied for. In the absence of express authority, an agreement by the agent to accept such credit as payment of the premium is not binding on the company, and such credit cannot be held to be a payment of the premium. An agent cannot accept a credit on his personal indebtedness as payment on a sum due or to be due to his principal by his creditor, and thereby bind his principal, unless the principal has expressly authorized the agent to do so. All persons dealing with an agent do so with notice of this salutary principle of the law of principal and agent, which is too well established to require citation of authorities.

During the trial, plaintiffs offered in evidence, for the purpose of showing that a policy of insurance upon the life of Richard C. Turlington had been issued by defendant pursuant to his application therefor, a printed notice received by plaintiffs, after the death of Richard C. Turlington, through the mail, to the effect that a quarterly premium on a policy issued by defendant to said Richard C. Turlington, dated 15 February, 1924, would be due on 15 May, 1924, "if said policy was then in force."

The court was of opinion that if the jury should find that defendant sent this notice, it was evidence of its ratification of the transaction between Dr. C. S. Turlington and defendant's agent, with respect to the payment of the premium at the date of the application. There was no evidence, however, that at the time defendant sent said notice, if it did send same, it had any knowledge of such transaction. In the absence of such evidence, the act of defendant could not be a ratification of the unauthorized act of its agent.

There was error in refusing to allow defendant's motion, at the close of all the evidence, for judgment dismissing plaintiffs' action as upon nonsuit. The judgment herein must be reversed and the action dismissed, for the reason that upon all the evidence plaintiffs cannot recover of defendant in this action.

Reversed.

HECTOR HARRIS v. PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY.

(Filed 6 April, 1927.)

Insurance, Accident—Policy—Contracts—Sole Cause of Injury—Evidence —Questions for Jury—Nonsuit.

Where a policy of accident insurance provides that the insurer will not be liable unless the injury resulted directly and exclusively of all other causes from bodily injuries sustained, etc., evidence that the insured had sustained an injury from a gun-shot wound of some twenty years before that had healed, and there was no causal connection between it and the injury complained of, and evidence *per contra*, raises an issue for the jury, and the defendant's motion as of nonsuit should be denied.

CIVIL ACTION, before *Midyette, J.*, at November Term, 1926, of HOKE.

The evidence tended to show that the defendant issued an accident insurance policy to the plaintiff in December, 1923; that on or about October, 1924, while said policy was in force, the plaintiff accidentally slipped into a hole and as a result suffered serious injury, and has not been able to work since the accident.

The plaintiff testified that about twenty years prior to taking out the policy he had suffered a gun-shot wound in his hip, and that at the time defendant's agent solicited him for insurance he notified the agent of his injury, and of the further fact that he was a "sort of a cripple by reason of the fact that one leg was shorter than the other. . . . I told him about my wound and that it had been cured up twenty years ago. I told him it was a gun-shot wound. He took my money and gave me a note for it, and in about three or four days the policy came back." At the time of the trial the plaintiff was suffering from a chronic pus and infection of the bone in his right leg.

The defendant contended that plaintiff's injury was not due to the accident in falling in a stump hole, but was due to the gun-shot wound. In this connection, plaintiff testified: "After the gun-shot wound cured up, I did not suffer any from it. . . . That wound began to run about a month after I fell in the hole. This leg had not hurt me in twenty years before. It gave me pain several times when I would work, and in about four weeks after the accident it began to run. . . . If any skin was broken, it was on the inside. I would not say whether it broke any bones or not, some shattered or thin pieces of bone came out."

Dr. Murray, witness for the defendant, testified that plaintiff "claimed he fell and injured his leg and it started up some old trouble that he had before from a gun-shot wound. . . . I could not tell how long this wound had been running. I do not have an opinion as to how long it had been running, or whether it was an old or new wound. . . . Falling into this hole, as he claimed to you he did, could have caused this trouble. He told me that this old gun-shot wound had not given him any trouble prior to the injury in several years. Taking into consideration his statement to me, the primary cause of the running condition was the gun-shot wound. It started up the old trouble."

At the conclusion of the evidence, the motion for nonsuit made by the defendant was sustained, and the plaintiff appealed.

H. W. B. Whitley for plaintiff.
Smith & McQueen for defendant.

BROGDEN, J. The accident policy upon which the plaintiff brings this suit insures the plaintiff against "the effects resulting directly and exclusively of all other causes from bodily injury sustained during the life of this policy, solely through external, violent, and accidental means," etc.

Viewing plaintiff's evidence in its most favorable light, as we are required to do in cases of nonsuit, the question to be determined is whether or not plaintiff's injury "resulted directly and exclusively of all other causes . . . solely through external, violent and accidental means." The rule of law governing the cause of action is thus summarized by *Justice Walker* in *Penn v. Ins. Co.,* 160 N. C., 404:

"1. When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.

"2. When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause.

"3. When at the time of the accident there was an existing disease, which, coöperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as the cause independent of all other causes." *Penn v. Ins. Co.,* 158 N. C., 29; *Fishblate v. Fidelity Co.,* 140 N. C., 593.

The plaintiff asserts that there was no causal connection between the gun-shot wound and the accidental injury. Upon the contrary, the defendant asserts that the plaintiff's injury was the result of the pre-existing injury occasioned by the gun-shot wound. The evidence of the plaintiff tended to show that the gun-shot wound was thoroughly cured at the time of the accident. The evidence of the defendant was to the contrary. Conflicting testimony does not warrant a withdrawal of the case from the jury. It is for the jury to determine what weight shall be given to the evidence. *Shell v. Roseman,* 155 N. C., 90; *Christman v. Hilliard,* 167 N. C., 5; *Lee v. Brotherhood,* 191 N. C., 359; *Smith v. Coach Line,* 191 N. C., 589.

We conclude, upon the whole record, that there was sufficient evidence to be submitted to the jury upon the issues arising upon the pleadings.

Reversed.

STATE v. DANIEL GIBSON, HENRY BAKER, AND JOHN BAKER.

(Filed 6 April, 1927.)

1. **Criminal Law—Evidence—Identity—Questions for Jury—Nonsuit.**

   Evidence of identity of the defendants as the ones who committed an assault upon the prosecutor with a deadly weapon, C. S., 4213, inflicting injury, is sufficient, which tends to show that the defendants visited him, the prosecutor, at his home, used abusive and threatening language, were traced and found together by the officers of the law soon after the assault, one of them made false statements as to the direction from which they had come; the shotgun they had was warm from firing, and the shells found there were identical with shells which had been fired and were found at the place of the injury, etc., is sufficient to take the case to the jury, upon defendants' motion as of nonsuit thereon.

2. **Criminal Law—Evidence—Malice.**

   Where malice is an ingredient of a criminal offense charged in the indictment, previous threats are admissible thereof, though not admissible as substantive evidence.

APPEAL by defendants from *Midyette, J.,* at August Term, 1926, of HOKE.

The defendants were indicted for a secret assault upon J. A. Brock with a deadly weapon with intent to kill, in breach of C. S., 4213, and were convicted of an assault with a deadly weapon. From the judgment pronounced, they appealed, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Smith & McQueen for defendants.

ADAMS, J. The defendants, introducing no testimony, moved to dismiss the action on the ground that the State's evidence did not warrant the verdict. To establish the identity of the defendants, the prosecution relied upon circumstantial evidence; and as there is no exception to the instructions, the question is whether the evidence is of sufficient probative strength to sustain the finding of the jury. On this point a concise statement of the proof is essential.

The prosecutor, J. A. Brock, was married to Mrs. W. R. Gibson in September, 1925. The land of her former husband descended to their children upon his death, subject to her "life estate" or "dower rights." Brock cut some logs or timber on the land, and two weeks before the alleged assault, Daniel Gibson and Henry Baker, with two others, went to his home, "raised a fuss," cursed him when ordered to leave the place, and said they would see him later. On Saturday night, 12 June, 1926, between twelve and one o'clock, when Brock, his wife, and his two sons were asleep, his house was attacked and he was shot in the foot. He testified that when he awoke guns were firing and "bullets were raining in there just like hail." When the firing ceased, he went to Raeford and sent officers to "the scene of action." Arriving about two o'clock, the officers found blood on the bed, panes out of the windows, glass on the floor, and pistol balls and buckshot to the number of 195 in the mantelpiece and in other places; and twenty feet to the north of the house they discovered men's tracks, one of which they followed up the road to the mailbox on the turnpike or highway. Returning to the house, they saw two other tracks, one pointing in the same direction, and afterwards turning and leading side by side with another track to the east. These two tracks went through a field and a wood into an old road, half a mile from Brock's house. Here were seen fresh car tracks at the side of the road, and evidence of oil that had leaked—tracks made by a nonskid tire going from this place into the turnpike or highway and on by the mailbox, where, it was testified, the car had stopped. The car track led to Henry Baker's house, and there in a shelter a car was found having the same nonskid tires. The water and the radiator were warm. The three defendants were together in Henry Baker's house when the officers arrived early in the morning. Henry said it was John's car, and that it had been driven in at seven o'clock on the evening before; John admitted the car was his, and said that he had brought it in at seven or eight on the preceding day by way of Blue's Bridge; but when the officer suggested that he was mistaken, he admitted that his statement was not true, and that he had come from Wagram. The arrest was made about eleven or twelve o'clock; guns in Henry Baker's house were examined and showed indications of having recently been shot; and the shells in the gun and those taken from Baker's trunk corresponded with the shells which were found at Brock's house.

The assault was not questioned; and this recital contains evidence which, considered most favorably for the State, was sufficient to justify the jury in identifying the defendants as the assailants. The motion to dismiss the action was therefore properly denied. *Snider v. Newell,* 132 N. C., 614; *Newby v. Realty Co.,* 182 N. C., 34.

The first six exceptions, together with those designated 32 and 38 and 56 to 61 are eliminated; the seventh is without merit; and those numbered 8 to 15 relate to testimony offered to show malice and motive. True, ordinarily previous threats are not admissible as substantive evidence in a prosecution for assault and battery, but the rule is otherwise where malice, as here, is an ingredient of the offense charged in the indictment. *S. v. Norton,* 82 N. C., 629; *S. v. Kimbrell,* 151 N. C., 702. The evidence to which exceptions 17 to 29 are addressed was expressly withdrawn from the jury. *S. v. Green,* 92 N. C., 779; *S. v. Turner,* 143 N. C., 642; *S. v. Stratford,* 149 N. C., 483; *Cooper v. R. R.,* 163 N. C., 150. Exceptions 30 and 31 and 39 to 55 impeach the effect of the evidence rather than its competency, that which is the subject of the 51st exception having been afterwards elicited by the defendants. The motion to strike out all evidence relating to the bloodhound was made by the defendants, and as it was finally granted, we discover no way in which they were prejudiced, no sound reason why they should now complain. We find

No error.

STATE v. ERNEST WALKER.

(Filed 6 April, 1927.)

1. **Criminal Law — Instructions — Excerpts from Charge — Appeal and Error.**

While the State is bound to show beyond a reasonable doubt every material element of the offense charged, an instruction to the jury will not be held for error if contextually construed as a whole, but not disjointedly as to excerpts from its various parts, the rule of law has been followed by the Court.

2. **Homicide—Murder—Capital Felony—Instructions—Burden of Proof.**

Where the prisoner is on trial for murder in the first degree, burglary and rape, and there is evidence to support a verdict for each of these offenses, an instruction is proper, when construed as a whole, that the burden of proof was on the State to show beyond a reasonable doubt an unlawful killing with malice and with premeditation and deliberation, or murder committed in the perpetration, or attempt to perpetrate, other felonies named.

3. **Homicide — Evidence — Presumptions — Malice — Deadly Weapon— Murder.**

Where there is evidence that the prisoner on trial for a homicide killed the deceased by striking him on the head with an axe, a deadly weapon, the law raises the presumption that the killing was with malice at least sufficient to sustain a verdict of murder in the second degree.

4. Homicide—Drunkenness—Intoxication.

As to the defense for committing a homicide, that it was done under the influence of voluntary intoxication or drunkenness, upon the question of mental incapacity, apply *S. v. Ross, ante,* 25, and other cases cited in that opinion.

APPEAL by defendant from *Lyon, Emergency Judge,* at October Term, 1926, of DURHAM.

Criminal prosecution, tried upon an indictment charging the defendant with a capital felony, to wit, murder in the first degree.

Verdict: Guilty of murder in the first degree (as shown by return to writ of *certiorari*).

Judgment: Death by electrocution.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Mel. J. Thompson and B. Ray Olive for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on the night of 25 July, 1926, the prisoner, Ernest P. Walker, a colored man, burglariously entered a dwelling-house in the city of Durham, in the night time, with intent to steal the goods and chattels of another then being in said dwelling-house, ravished Louie Cassidy, a colored woman, one of the occupants therein, murdered her husband, Joseph Cassidy, also an occupant of the house, by striking him three times on the head with an axe, successfully made his escape, and was arrested at his home three or four days thereafter. The murder, for which alone the prisoner has been tried and convicted, was committed in the perpetration of rape, robbery, and burglary. The charge is not denied; in fact, the *corpus delicti,* with all of its attendant atrociousness, is admitted. The defense interposed by the prisoner amounts to a plea of insanity, alleged to have been aggravated by intoxication or drunkenness at the time. The evidence tending to support this plea was properly submitted to the jury, and was rejected or found to be unsatisfactory. *S. v. Campbell,* 184 N. C., 765; *S. v. Terry,* 173 N. C., 761.

It is well settled, by a long line of decisions, that, in this jurisdiction, as well as in many others, in a criminal prosecution, where insanity is interposed as a defense, the burden of proof is on the defendant, who sets it up, to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Jones,* 191 N. C., 753, and cases there cited.

The only questions presented by the defendant's appeal relate to the correctness of certain instructions contained in the court's charge to the jury, and to the refusal of his Honor to give, without modification, as requested, two of the prisoner's prayers for special instructions.

The first exception is directed to the following portion of the charge: "Now, before you can convict the defendant of murder in the first degree, you must be satisfied beyond a reasonable doubt (and the burden is on the State to satisfy you that the killing was either done in premeditation and deliberation, or was done in the commission, or attempt to commit, some other felony, burglary, rape, or arson)."

The prisoner excepts and assigns as error only that part of the instruction in parenthesis. If the part to which the prisoner excepts contained all that the judge said in regard to the burden of proof, which it does not, clearly the instruction would be erroneous, for, in every criminal prosecution, the prisoner's plea of traverse casts upon the State the burden of establishing his guilt beyond a reasonable doubt before a verdict can be rendered against him. *S. v. Tucker,* 190 N. C., 708; *S. v. Singleton,* 183 N. C., 738; *Speas v. Bank,* 188 N. C., 524. But the prisoner is not permitted to take parts of sentences, or select detached portions of the charge, and assign errors as to them, when, if considered with other portions, they are readily explained, and the charge in its entirety appears to be correct. Every instruction must be considered with reference to what precedes and follows it. In other words, it must be taken in its setting. As has so often been said, the court's charge is to be considered contextually and not disjointedly. *S. v. Lee,* 192 N. C., 225; *In re Hardee,* 187 N. C., 381; *Milling Co. v. Highway Commission,* 190 N. C., p. 697, and cases there cited.

By correct interpretation, we think the court, in the above instruction, meant to say, and, when read in the light of the whole charge, did say, that before the prisoner could be convicted of murder in the first degree, the burden was on the State to satisfy the jury beyond a reasonable doubt of every element necessary to constitute an unlawful killing with malice and with premeditation and deliberation, or a murder committed in the perpetration, or attempt to perpetrate, some other felony, such as arson, rape, or burglary. As thus understood, the instruction is in keeping with the language of the statute, C. S., 4200, and accords with the pertinent decisions on the subject. Hence, the prisoner has no valid ground for complaint, so far as this instruction is concerned. *S. v. Steele,* 190 N. C., 506; *S. v. Benson,* 183 N. C., 795.

The court also instructed the jury, to which exception is taken, that when a killing with a deadly weapon is admitted or established by the evidence, the law raises two presumptions against the slayer: first, that the killing was unlawful, and, second, that it was done with malice, and that an unlawful killing with malice is murder in the second degree. This instruction is free from error. *S. v. Benson, supra; S. v. Fowler,* 151 N. C., 732. An axe, when viciously used, as under the circumstances of this case, is certainly a deadly weapon, and the trial court was fully justified in so instructing the jury. *S. v. Smith,* 187 N. C., 469, and cases there cited.

The special instructions, relative to the prisoner's alleged intoxication, or voluntary drunkenness, were properly modified so as to conform to the law as declared in *S. v. Ross, ante,* 25; *S. v. Allen,* 186 N. C., 302; *S. v. English,* 164 N. C., 498, and *S. v. Murphy,* 157 N. C., 614. The court committed no error in this respect.

A careful scrutiny of the record convinces us that the prisoner has had a fair and impartial trial—one entirely free from reversible error or valid criticism.

The verdict and judgment must be upheld.

No error.

ANNA VINCENT v. UNICE IDRA VINCENT.

(Filed 6 April, 1927.)

Divorce—Alimony Pendente Lite—Counsel Fees—Statutes—Evidence—Appeal and Error—Record.

Under express provisions of 3 C. S., 1667, the wife, in her action for divorce *a mensa et thoro,* may apply to the court for alimony or subsistence to be allowed her *pendente lite,* and for her counsel fees in accordance with the value of her husband's estate considered with her lack of separate means. When sufficient allegation is made by her in her complaint, a denial in the answer raising an issue for a later determination of the jury before final decree in the proceeding for the divorce sought by her in her action, and on this appeal by the husband: *Held,* it does not appear of record that he was not afforded opportunity to introduce his evidence, and the temporary order allowing her alimony is sustained.

APPEAL by defendant from *Daniels, J.,* at October Term, 1926, of PERSON.

Cooper Hall for appellant.
Luther M. Carlton for appellee.

ADAMS, J. The appellee, after due notice to the appellant, filed her petition for alimony without divorce, as provided in 3 C. S., 1667, and at the hearing his Honor found the following facts: The petitioner and the defendant were married on 4 February, 1926, and lived together until 2 June, 1926; the conduct of the defendant towards the petitioner was as alleged in sections three and five of the petition; the defendant is a farmer, thirty-two years of age, in good health, and has an earning capacity of $600 a year; the petitioner has no property or estate of her own, and will soon be confined. The petition sets out a good cause of action for divorce from bed and board. Upon these facts, it was ordered that the defendant pay the petitioner until the final determination of the cause the amount allowed as subsistence, together with a designated fee for her counsel.

The facts are sufficient to support the order, but the defendant says that the order is invalid because he had no opportunity to be heard, or to produce his evidence, and in support of his contention relies chiefly on the entry in the record that "the defendant offered the following answer and affidavit, which was declined to be heard by the judge."

It is provided in the statute above cited that the wife may institute an action to secure a reasonable subsistence and counsel fees from the estate or earnings of her husband, (1) if he shall separate himself from her and fail to provide for her and their children the necessary subsistence according to his means and condition; (2) if he shall be a drunkard or spendthrift; (3) if he shall be guilty of any misconduct or acts which would be cause for divorce, absolute or from bed and board. The issuable facts raised by the pleadings are to be determined by the jury at the final hearing. *Skittletharpe v. Skittletharpe,* 130 N. C., 72; *Hooper v. Hooper,* 164 N. C., 1; *Crews v. Crews,* 175 N. C., 168. It should be observed, however, that these decisions were made prior to the amendments of 1919, 1921, and 1923. Laws 1919, ch. 24; *ibid.,* 1921, ch. 123; *ibid.,* 1923, ch. 52.

Before the amendment of 1919, there was no provision in the statute for an allowance *pendente lite;* but now there is express provision that pending the trial and final determination of the issues it shall be lawful for the judge to cause the husband to secure for the benefit of the wife and children so much of his estate as may be proper under the circumstances. For the purpose of deciding whether subsistence should be allowed the judge may make a preliminary finding of the facts without prejudice to the rights of the parties to a trial before the jury on the issues joined, although it is not required that the facts be found as a basis for his order. *Price v. Price,* 188 N. C., 640.

In a suit for alimony *pendente lite* under section 1666, the allowance may be made when a married woman applies for divorce, either from the bonds of matrimony or from bed and board, and alleges facts which are sufficient to entitle her to the relief demanded, and are found by the judge to be true upon her application, if she has not sufficient means whereon to subsist during the prosecution of the suit. The judge is not required to determine the issues joined by the pleadings, and usually the only effect of the defendant's answer is to raise the issues. It does not affect the rule stated by *Walker, J.,* in construing section 1666: "The plaintiff applies for divorce *a mensa,* and sets forth sufficient facts in her complaint which, if finally found to be true, will entitle her to the relief for which she prays, and the judge finds her allegations to be true, and that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof. This entitles her to alimony, as ordered by the judge." *Hennis v. Hennis,* 180 N. C., 606. We see no satisfactory reason why a more rigid rule should be applied to section 1667, for its provisions are no less comprehensive than those of 1666. Here, as in *Hennis v. Hennis, supra,* the plaintiff made allegations which, if finally found to be the facts, will entitle her to the relief prayed, and for the purpose of determining her right to subsistence pending the action, the judge found her allegations to be true. Evidently he proceeded on the principle that the defendant's answer simply raised issues to be heard and determined by the jury; that as the burden was on the plaintiff, her allegations were deemed to be denied; and that the evidence which was heard and upon which he based his findings of fact entitle the plaintiff to temporary relief. We find nothing in the record to warrant the conclusion that the defendant was not permitted to introduce other evidence, or that he was denied the due process of law.

The judgment is
Affirmed.

IN THE MATTER OF WILL OF NORA D. FOY.

(Filed 6 April, 1927.)

1. **Wills—Deceased Persons—Transactions and Communications — Evidence—Statutes.**

The facts that upon the trial of a caveat to a holograph will the testatrix had placed the paper-writing in a tin box in her trunk, with her other valuable papers and effects, enumerating them; that the deceased carried the keys of the trunk, and these keys were given the witness, a beneficiary under the will, by some of the "women folks" when testatrix died, etc., are of transactions within the personal knowledge of the witness, and evidence thereof is not forbidden by our statute, excluding personal communications and transactions with deceased persons.

2. **Wills—Revocation—Gifts—Statutes.**

A bequest of personal property in a trunk which contained the holograph will and other valuable papers of the deceased, after removing certain articles specifically bequeathed to others, is not a revocation of her will by the testatrix. C. S., 4133, *et seq.*

CIVIL ACTION, before *Grady, J.*, at November Term, 1926, of PENDER.

This was a caveat to the will of Nora D. Foy. The will was executed on 11 August, 1921. The testatrix died on Friday, and on Monday after her death R. L. Foy, chief beneficiary and executor named in the will, together with a neighbor, went to the room of the deceased, unlocked her trunk and found her will in a tin box in the tray of the trunk. The will was contained in an envelope, marked on the outside, "The Will of Nora D. Foy." The tin box in which the will was found contained insurance papers, some gold pieces, returns from real estate, and records of her business transactions. The wedding rings of the deceased were also in the trunk. The deceased had an iron safe in another room of the house, and also had a lock box at the bank. There was abundant evidence to the effect that the paper-writing, and every part thereof, including the notation on the back of the envelope, and also including certain interlineations, were all in the handwriting of the deceased.

The issues and the answers of the jury thereto were as follows:

1. Is the paper-writing offered for probate, and each and every part thereof, in the genuine handwriting of Nora D. Foy; and was said paper-writing found among her valuable papers and effects after her death? Answer: Yes.

2. Is the paper-writing offered for probate, and each and every part thereof, the last will and testament of Nora D. Foy? Answer: Yes.

From judgment upon the verdict, the caveators appealed.

Bryan & Campbell for propounders.
John D. Bellamy & Sons for caveators.

BROGDEN, J. The caveators assign as error testimony of a devisee in regard to: (1) handwriting of the testatrix; (2) that he found the script propounded, in a tin box in the tray of a trunk in the room occupied by the deceased; (3) that the deceased carried the keys of the trunk; (4) that the keys to the trunk were given to witness "by some of the women-folks that were in the room the morning" testatrix died; (5) that the tin box in which the paper-writing was found contained insurance policies, gold pieces and returns from real estate; (6) that all the business transactions of deceased were kept in the tray of the trunk in which the will was found.

The trial judge properly admitted the testimony. *Cornelius v. Brawley,* 109 N. C., 542; *In re Jenkins,* 157 N. C., 429; *In re Cole,* 171 N. C., 74; *McEwan v. Brown,* 176 N. C., 249; *In re Saunders,* 177 N. C., 156; *In re Westfeldt,* 188 N. C., 702.

It is urged that the testimony relating to the keys of the trunk and the record of business transactions contained therein must have been based upon personal transactions with the deceased. We do not think this contention can be maintained. These were independent facts, and, so far as the record discloses, were based upon independent knowledge, not derived from any transaction or communication with the deceased. *Sutton v. Wells,* 175 N. C., 3; *In re Will of Saunders,* 177 N. C., 156.

In item eleven of the will, the testatrix, among other bequests, bequeathed to Melvina or Mellie D. Foy, one of the caveators, "my trunk with its contents, after taking out the articles that I have mentioned for others." In connection with this bequest, the caveators requested the court to charge as follows: "That if the jury shall find from the evidence that the will was found in her trunk, and that under the terms of the will the jury shall find that the trunk and its contents were given to Mrs. Melvina Foy, the jury have the right to consider this as an intent to give the will to her that she might destroy or do with it as she pleased, and that she did not intend it to operate as a will."

The court properly declined to give this instruction. The legal effect of such an instruction would be equivalent to holding that a will could be revoked by gift of the receptable in which the will was found. The acts which constitute a revocation of a will are defined and prescribed by statute. C. S., 4133, *et seq.*

We hold that the case was properly tried, and the judgment as rendered must stand.

No error.

R. S. HINTON, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF THE STATE OF NORTH CAROLINA, v. B. R. LACY, AS STATE TREASURER, AND W. N. EVERETT, W. A. GRAHAM, DENNIS G. BRUMMITT, FRANK D. GRIST AND B. R. LACY, AS MEMBERS OF THE BOARD OF ADVISORS, CREATED BY CHAPTER 155, PUBLIC LAWS OF 1925, AND JOHN H. MANNING, AS COMMISSIONER OF THE VETERANS LOAN FUND UNDER SAID CHAPTER.

(Filed 6 April, 1927.)

1. **Constitutional Law—Statutes—Courts.**

The courts will not declare a statute unconstitutional where its validity may be sustained by a reasonable construction, or its invalidity by such interpretation thereby unmistakably appears.

2. **Constitutional Law—Taxation—Bonds — War — Faith and Credit—Loans to Veterans—Public Purpose.**

A statute for the purpose of issuing bonds, passed by the Legislature in accordance with the constitutional provision as to the "aye" and "no" vote, and its passage upon the separate days by each branch of legislation, and which has been approved by the vote of the people of the State at an election duly had for the purpose, Const., Art. V, sec. 4, providing for an issuance and sale of State bonds for the purpose of lending the proceeds on mortgage to a certain amount of the value of the land to the veterans of the World War to help them in providing homes for themselves, is the pledging of the credit of the State for a public purpose, and is a valid exercise of statutory authority. Const., Art. VII, sec. 7.

3. Same—Class Legislation—Uniformity of Taxation.

It is not unconstitutional as class legislation for a statute providing for the sale of State bonds for the purpose of aiding veterans of the World War in acquiring homes by loaning them money under mortgage, for the act to exclude those who had not engaged in active military service or who had been dishonorably discharged, or who had secured positions under the Government during the war that had not exposed or tended to expose them to danger in the fighting territory. Const. of N. C., Art. I, sec. 26; Art. XII, sec. 1.

4. Same—Curative Statutes—"Aye" and "No" Vote—Separate Days.

Where a statute, pledging the faith and credit of the State in issuing State bonds, has not been passed in accordance with the provisions of our State Constitution, Art. II, sec. 14, and are therefore invalid, its invalidity may be cured by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bonds thereunder issued after the question has been submitted to and approved by the voters of the State, as the statute required, are valid.

5. Same—Government—Federal Government.

Under our system of government, a declaration of war by Congress and the drafting of soldiers, is an act on the part of each State in the Union, and is for the interest of all, and does not affect the validity of a State bond issue providing money to aid the citizens of the State who had performed active military service in the war so declared, which is otherwise valid under the Constitution of the State enacting the statute.

APPEAL by plaintiff from *Devin, J.*, at January Term, 1927, of WAKE. Affirmed.

This action was brought to restrain the defendants from acting under and carrying out the provisions of chapter 155, Public Laws of 1925, known as the World War Veterans Loan Act. The act provides for the issuance of $2,000,000 in bonds by the State of North Carolina and the use of this sum in making loans to veterans of the World War, the loans not to be in excess of $3,000 to any one person, and not to exceed seventy-five per cent of the appraised value of the real estate offered as security. The proposition was submitted under the terms of the act to the electors of the State at the general election held on 2 November, 1926, and was carried for the issuance of the said bonds by a majority of 39,867 of the votes cast on the proposal.

The plaintiff brings this action to restrain the issuance of the bonds. He alleges that the act authorizing the bonds is unconstitutional and void for that taxes and public revenues can be levied only for public purposes; for that it violates Article I, sec. 17, of the Constitution, which provides that no person shall be deprived of his property except by the law of the land; for that it is class legislation and confers privileges and emoluments upon a set of men not in consideration of public services in violation of Article I, sec. 7 of the Constitution, and for that it violates the spirit of Article I, sec. 26, and Article XII, sec. 1, of the Constitution; and for the reason that the act does not specifically declare that the full faith, credit and taxing power of the State are pledged to the payment of the principal and interest of the bonds, and the Board of Advisers is without power or authority to resolve that each bond shall recite upon its face that the full faith, credit and taxing power of the State are pledged to the payment of the principal and interest thereof. The other necessary facts and contentions will be stated in the opinion.

Bunn & Arendell for plaintiffs.

Attorney-General Brummitt, Assistant Attorney-General Nash and John H. Manning for defendants.

CLARKSON, J. The Legislature of 1923 passed an act known as the "World War Veterans' Loan Act," Public Laws 1923, ch. 190. The purpose of the act was to make loans to provide urban and rural homes upon favorable terms for veterans who served with the military or naval forces of the United States in the recent war with Germany and the other Central Powers. To carry out the provisions of the act the question of contracting a $2,000,000 bonded indebtedness of the State of North Carolina was submitted to a vote of the people of the State at the general election in 1924. The vote for the bonded indebtedness was 143,015, against 62,261—a majority of 80,754 of the votes cast. The question arose as to whether the act as submitted required a majority of the qualified electors or a majority of the votes cast on the proposal. This Court, in *Patterson v. Everett,* 189 N. C., p. 828, under the interpretation given to the act, decided that the authority to issue the bonds had to be approved by a majority of the qualified electors of the State and not of the votes cast. It was conceded that this was not done, and the bonds therefore, if issued, would not be valid and binding obligations of the State. The decision states that "The parties having requested a decision in this case during the present session of the Legislature, to the end that further action may be had upon the subject, if found necessary." The decision was rendered 25 February, 1925.

In consequence the Legislature of 1925, then in session, again submitted the proposition to the people of the State—qualified electors—at the November, 1926, election. The proposal submitted required a majority of the *votes cast,* the adoption was by a majority of 39,867.

The ideals of the two acts are practically the same. We have under consideration in this case, therefore, a proposition which has received the calm, deliberate approval of two General Assemblies, was passed by both in accordance with the constitutional requirements, and has been calmly and deliberately considered by the people of this commonwealth in two general elections, and in both of these elections the people have sanctioned this measure by an overwhelming majority of those voting on the proposal submitted.

Sec. 2 of the act (Public Laws 1925, ch. 155), says: "The purpose of this act is, in recognition of military service, for the encouragement of patriotism, and to promote the ownership of homes, to provide a means by which soldiers, sailors, marines and others who served with the armed forces of the United States in the recent World War against the central powers may acquire urban homes or farms upon favorable terms."

At a Congress of the representatives of the Freemen of the State of North Carolina, assembled at Halifax on 17 December, A.D. 1776, a declaration of rights was read three times, and ratified in open Congress, and on 18 December, A.D. 1776, the first State Constitution was ratified in the same manner, and "the declaration of rights is hereby declared to be a part of the Constitution of this State and ought never to be violated on any pretense whatever." (Sec. 44.) This State, on 21 November, 1789, ratified the Constitution of the United States. At New Bern, November Term, 1787, in *Bayard v. Singleton,* 1 N. C., 42, an act of the General Assembly of 1785 was declared unconstitutional and void—"stand as abrogated and without any effect." This power has since consistently been recognized in this State.

Speaking to the subject, this Court, in *S. v. Knight,* 169 N. C., at p. 352, said: "Between these cases that are cited, running from the first volume of our Reports to the 160th, covering a period of one hundred and twenty-five years, there could be cited fifty or more cases in which acts of the General Assembly have been declared unconstitutional, and we can find no judicial opinion to the contrary."

In *Sutton v. Phillips,* 116 N. C., at p. 504, speaking to the question, this Court said: "While the courts have the power, and it is their duty, in proper cases to declare an act of the Legislature unconstitutional it is a well recognized principle that the courts will not declare that this coördinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. *If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.* (Italics ours) . . . (p. 505). It cannot be said that this act is plainly and clearly unconstitutional. The doubt, if any, must be resolved in favor of the General Assembly."

S. v. Baskerville, 141 N. C., 818; *In re Watson,* 157 N. C., at 349; *S. v. Knight,* 169 N. C., at 352; *Faison v. Comrs.,* 171 N. C., 415; *S. v. Perley,* 173 N. C., 790; *R. R. v. Cherokee County,* 177 N. C., 88; *Coble v. Comrs.,* 184 N. C., 342; *S. v. Kelly,* 186 N. C., 377; *R. R. v. Forbes,* 188 N. C., 155.

Every presumption is in favor of the constitutionality of an act of the Legislature, and without the clearest showing to the contrary it should be sustained. It is to be presumed that the law-making body were mindful of their oaths and acted with integrity and honest purpose to keep within the constitutional limitations and restrictions. The breach of the Constitution must be so manifest as to leave no room for reasonable doubt.

Mr. Banks Arendell, an ex-service World War veteran (lieutenant who went over seas), representing plaintiff, in an able argument and brief, contends:

(1) "The purpose of the act is not a public purpose, and violates a fundamental principle, and also Article I, sec. 17, of the Constitution. The act violates Art. I, sec. 7, of the Constitution. Privileges granted are not in consideration of public service."

Const., Art. I, sec. 17, is as follows: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land." Compare Const. of U. S., Art. XIV, sec. 1—due process clause.

The principle laid down in *Comrs. v. State Treasurer,* 174 N. C., at p. 146, is cited: "It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Art. I, sec. 17, which forbids that any person shall be disseized of his freehold, liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land." This principle has been reiterated in *Ellis v. Green,* 191 N. C., at p. 765.

The question is also presented by plaintiff: Is payment to a Federal soldier a public purpose of the State? Is payment of a reward or gratuity to any soldier, Federal or State, a public purpose of the State if made after the war is over, and not under any promise, express or implied, which would have encouraged enlistment?

On the other hand, it is admitted by defendants that "Taxes and public revenues can be levied only for public purposes. That the purpose of this act is public rather than private. It does not grant privileges and emoluments but in consideration of public services. The defendants contend that this measure is in line with the well settled policy of the State; that it is for a public purpose; is in consideration of public service and not in any sense class legislation. The act does not propose any gift to those for whose benefit it was passed. It simply proposes to aid them in the acquirement of homes. The money to be loaned is well protected in that the amount which can be loaned to any one person is limited to $3,000 and cannot exceed seventy-five per cent of the appraised value of the real estate offered as security. For the promotion of agriculture, the Federal Government has established Farm Loan Banks, and this act is modeled after the act of Congress on that subject. This State now does many things for the promotion of agriculture and its industries. It has never been suggested or held that such was class legislation. The State has granted pensions to Confederate soldiers, involving the payment of large sums of money in the aggregate, and even the present General Assembly made a substantial increase in appropriations for this purpose. The payment of pensions to Confederate soldiers has been approved by popular sentiment since the first legislative enactment, and the authority so to do has never been denied by this Court. At this time pensions to Confederate soldiers are larger per capita and in the aggregate than ever before in the history of the State, and such payments are sanctioned by the almost unanimous voice of the people." We agree with the contention of the defendants, and are of the opinion that the purpose of the act is public.

This proposal has been passed upon twice by the Legislature and twice a majority of the qualified votes cast at general elections have approved the purpose, the ballot voted being "For World War Veterans' Loan Bonds."

The first section of "A declaration of rights" of the people of the State, ratified 17 December, 1776, says: "That all political power is vested in and derived from the people only."

The second section of Article I of the present Constitution (1868) says: "That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

The will of the people has been twice expressed by solemn ballot. The present act, we think, is not only for a public purpose, but is for the good of the whole, and comes clearly within the limitations and restrictions of the Constitution of this State.

Even in Article V, part sec. 4, where there is restriction upon the increase of the public debt, it is set forth: "And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in completion of such railroad as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, *unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon.*" *Galloway v. R. R.*, 63 N. C., p. 147.

In *Hudson v. Greensboro*, 185 N. C., p. 502, "the statutes authorizing a city to issue its bonds and lend the proceeds of their sale to a railroad company to build a depot within its limits, when the question has been submitted to and approved by its voters, does not contravene the State Constitution, and is valid." *Clark, J.*, "We find that the undertaking is for a public purpose."

In *Ketchie v. Hedrick*, 186 N. C., p. 392, it is held, in substance, that under Article VII, sec. 7 of our State Constitution, restricting the power of the Legislature from allowing counties, cities, towns, or other municipal corporations to contract a debt, pledge its faith or loan its credit, or to levy or collect any tax except for the necessary expense thereof, does not authorize an appropriation of a certain per cent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein ascertained by an election duly held for that purpose.

From the reference it appears that our Constitution is liberal and the decisions of this Court go far in upholding questions where the matter has been submitted to the vote of the qualified electors—the people—carrying out the spirit, "and keep in mind that this is a government of the people, by the people, for the people, founded upon the will of the people and in which the will of the people legally expressed must control." *Quinn v. Lattimore*, 120 N. C., at p. 428.

Since the World War legislative enactments for bonuses, loans and welfare bonds for the World War veterans have been the subject of judicial decisions in many of the states of the Union.

Wisconsin: Known as "Soldiers' Bonus Law" (cash) estimated $15,000,000, voted on by the electors of the State in the affirmative at election held on 2 September, 1919. The purpose of the act was held to be public and not private, therefore constitutional. *S. v. Johnson* (170 Wis., 218), 175 N. W. Rep., p. 589. "Educational Bonus Act" is a public purpose and constitutional. *S. v. Johnson* (170 Wis., 251), 176 N. W. Rep., p. 224.

State of Washington: "The Veterans' Equalized Compensation Act" of $11,000,000 was approved by the electors of the State at an election held 2 November, 1920. The act provided for a bonus. The purpose of the act was held to be public and not private, therefore constitutional. *S. v. Clausen* (113 Wash., 570), 194 Pac. Rep., p. 793. See, also, *S. v. Clausen,* 201 Pac. Rep., p. 30.

Minnesota: Known as "Soldiers' Bonus Law" of $20,000,000, passed by Legislature without a vote of the people. The purpose of the act was held to be public and not private, therefore constitutional. *Gustafson v. Rhinow* (114 Minn., 415), 175 N. W. Rep., p. 903.

Missouri: Known as "State of Missouri World War Soldier Bonus Bonds," $15,000,000, voted on by people in the affirmative. The purpose of the act was held to be public and not private, therefore constitutional. *Fahey v. Hackmann* (291 Missouri, 351), 237 S. W., p. 752.

Illinois: Known as "Soldiers' Compensation Act," $55,000,000, passed by both branches of the Legislature without a dissenting vote. At the election 1,220,815 voted for it and 502,372 against it. The purpose of the act was held to be public and not private, therefore constitutional. *Hagler v. Small* (307 Ill., 460), 138 N. E. Rep., p. 849.

Iowa: Soldiers' Bonus Act, $22,000,000, submitted to a vote of the people and duly ratified at general election held 7 November, 1922. The purpose of the act was held to be public, and therefore constitutional. *Grout v. Kendall* (195 Iowa, 467), 192 N. W., p. 529.

Kansas: Known as "Kansas Soldiers' and Sailors' Act," $25,000,000, submitted to people by Legislature of 1921. Adopted by people by constitutional majority. Held to be for public purpose, and therefore constitutional. *S. v. Davis* (113 Kan., 4), 213 Pac. Rep., 171.

California: "Veterans' Welfare Bond Act," $10,000,000, 1921, submitted to voters of State and adopted. To be used "to acquire farms or homes." Held valid expenditure, public money for public purpose. *Veterans' Welfare Board v. Jordan,* 189 Cal., p. 124.

Most of the states gave bonuses to those who served longer than two months and honorably discharged, and who were in the service between 6 April, 1917, and 11 November, 1918, when war was declared, and Armistice Day.

New York: Bonus Act of 1920, providing for issue of $45,000,000, bonus for World War Veterans of New York, vote for 1,454,940, against 673,292. The majority of the Court held it invalid under Constitution of New York—*Cardoza* and *Pound, JJ.,* dissenting. *People v. Westchester* (231 N. Y., 465), 132 N. E. Rep., p. 241. Following the decision, the Legislature of New York submitted a constitutional amendment to the people of the State, on 28 February, 1923, authorizing issuance not to exceed $45,000,000 in bonds with which to pay a cash bonus to World War Veterans; this amendment was adopted at general election 6 November, 1923, by a substantial majority.

Maryland: In *Brawner v. Curran* (141 Md., 586), 119 Atl. Rep., p. 250, $9,000,000. Soldiers' Bonus Act held unconstitutional, but the Court said, at p. 255: "We are keenly conscious of the sacrifices which the soldiers, sailors, and nurses from this State made in the Great War, of the hardships they endured, of the high service they rendered, of the value of that service to the State and its people, and of their just claim to the grateful consideration of this State. It is unfortunate that this legislation through which the State attempted in some measure to recognize that claim must fall."

Montana: Soldiers' Compensation Act not public purpose. *S. v. Dixon* (66 Mont., 76), 213 Pac., 227.

(2) It is contended that it violates Article I, sec. 7, of the Constitution, which is as follows: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

The cases cited by plaintiff—like *Simonton v. Lanier,* 71 N. C., p. 503—are not applicable. The *Simonton case* was a private purpose, special privilege. "The charter of the Bank of Statesville was given the special privilege to lend money at a higher rate than the general State law. Referring to Article I, secs. 7 and 31, *supra, Bynum, J.,* said: 'The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government.' " This principal has been approved in *Power Co. v. Elizabeth City,* 188 N. C., at p. 288, and at this term in *S. v. Fowler, ante,* p. 290.

We think the spirit of this section, as well as the language "consideration of public services," must be construed in the light of the past. The philosophy of the life and conduct of the people of this State and its history has ever been generous and grateful to its heroic defenders in time of war, from its foundation to the present hour.

For example. Captain Johnston Blakely, a North Carolinian, commander of United States sloop of war, *Wasp,* which defeated the British sloops of war, *Reindeer* and *Avon,* in 1814 (in the War of 1812), and soon thereafter disappeared with all on board—one of the mysteries of the sea. He left an infant daughter, Udney Maria, and she was educated at the expense of the State in the best schools; an appropriation of $600 a year was made for her education and support, totalling $7,600. The Legislature authorized a superb sword, appropriately adorned, to be presented to Captain Blakely, but on his death the Legislature changed the gift and presented a set of tea plates, costing $500, to his daughter. The General Assembly of 1817 voted a sword and $250 annually for seven years to James Forsythe, eight-year-old son of Lieutenant-Colonel Benjamin Forsythe, of Stokes County, who served with distinction in the United States Army during the War of 1812, and was killed near Odelltown, Canada, in 1814. Forsyth County is named in his honor.

All through the history of the State are appropriations for pensions, etc., for the soldiers and sailors engaged in the different wars—monuments and other patriotic remembrances too numerous to mention. The legality of the appropriations have never been questioned.

A promise can be express or implied from surrounding circumstances. The service was *public*, the *consideration* is implied, as pensions and the like to soldiers and sailors have always been granted in this commonwealth since its origin, and the construction is based on the previous setting. We think this is the just and righteous construction of the language of the Constitution.

Mr. Brummitt, the able and distinguished Attorney-General, in a logical and eloquent argument before this Court, in part, said: "Since the dawn of civilization the nations of the earth have always recognized an obligation to those of its citizens who bore arms in their defense. This obligation has been fulfilled in many ways. Appropriate recognition of it has always served to encourage patriotism and the promotion of public welfare." He stated on the argument that, in his opinion, from a thorough examination of the Constitution and authorities, there was no question as to the legality of the act under consideration.

(3) It is contended that the classification is improper and unreasonable. The disabled are not compensated or rewarded. Religious discrimination voids the act under (a) Const., Art. I, sec. 26: "All men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience, and no human authority should, in any case whatever, control or interfere with the rights of conscience." (b) Const., Art. XII, sec. 1: "All able-bodied male citizens of the State of North Carolina, between the ages of twenty-one and forty years, who are citizens of the United States, shall be liable to duty in the militia: *Provided*, that all persons who may be averse to bearing arms, from religious scruples, shall be exempt therefrom."

Sections 3 and 4 of the act (Public Laws 1925, ch. 155) are as follows:

"Sec. 3. Every person who was enlisted, inducted, warranted or commissioned, and who served honorably in active duty in the military or naval service of the United States at any time between the sixth day of April, one thousand nine hundred and seventeen, and the eleventh day of November, one thousand nine hundred and eighteen, and who, at the time of entering such service, was a resident of the State of North Carolina, and who is honorably separated or discharged from such service, or who is still in active service, or has been retired, or who has been furloughed to a reserve, and who was in such service for a period of longer than sixty days, shall be entitled to borrow money from the fund provided by this act upon filing application and otherwise complying with the terms hereof so long as and to the extent that the funds herein provided for are available for that purpose.

"Sec. 4. The benefits of this act shall not be extended to the following classes of persons:

"(a) Those who were dishonorably discharged or discharged without honor; or

"(b) Those who, being in the military or naval service, refused on conscientious, political, or other grounds to subject themselves to discipline or to render unqualified service; or

"(c) Those who, though in the service, did civilian work at civilian pay; or

"(d) Those whose military service was confined to taking training in any students army or navy training corps."

It will be noted, under section 3, *supra,* that there is no discrimination between the able and disabled in regard to obtaining the benefit of the loan fund—they have equal rights under the act. It may be that the disabled should have extra compensation or reward, but this is not for us to determine. As to religious discrimination making the act void, we cannot so interpret it. The statute follows the Constitution and deprives certain classes of the benefits of the act. As to those who were "bomb-proof" and took no chances, they cannot complain. In each class all are treated alike. It is well settled that such legislation is not improper or unreasonable.

It is contended that the bonds violate the legislative act in pledging the faith, credit and taxing power of the State, Const., Art. II, sec. 14: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal." This contention has been eliminated. Since this case has been argued, the Legislature, H. B. 954, S. B. 1169, ratified 4 March, 1927, has passed an act in compliance with the provisions of the above article of the Constitution, of which we take judicial notice. Sections 1 and 2 are as follows:

"Sec. 1. This act shall be known and may be cited as the 'World War Veterans Supplemental Act.'

"Sec. 2. The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the two million dollars ($2,000,000) State of North Carolina World War Veterans Loan Bonds, authorized by chapter one fifty-five, Public Laws of nineteen hundred and twenty-five, and for the payment of the principal and interest of any notes issued in accordance with this act in anticipation of the sale of said bonds or any of them. When the Board of Advisers shall direct the State Treasurer to issue any of said bonds he shall sell the same at one time or from time to time at the best price obtainable, but in no case for less than par and accrued interest, and when the conditions are equal, he shall give the preference of purchase to the citizens of North Carolina. The manner in which said bonds shall be offered for sale shall be determined by the Governor and Council of State, either by publishing notices in certain newspapers and financial journals, or by mailing notices, or by inviting bids by correspondence or otherwise. All expenses necessarily incurred in the preparation and sale of the bonds shall be paid from the proceeds of such sale."

(4) It is contended that the act is paternalistic and extravagant. Plaintiff's attorney, a courageous ex-service soldier, who was over seas, says: "Finally, in both theory and practice, the purpose of this act is too paternalistic. It tends to kill the incentive on the part of its beneficiaries to work for what they get. An able-bodied ex-soldier, sailor or marine, ought not to need the sort of wing-sheltering that this proposed bond issue contemplates. If this bond issue is ratified by this Court, especially during the wild orgy of bond issues which we have gone through during the last few years, who knows but that some politician bidding for the ex-soldier vote, will propose another issue to equip these homes contemplated under this present bond issue with victrolas, radios and frigidaires, and possibly even new automobiles for the ex-service men? In fact, it might fall out that those of us of less iridescent dreams, might, at some future time, rise up and shout in unison, '*Quos Vadimus.*'" The wisdom of the legislation or the soundness of the economic policy involved is not within our province.

In the cases cited over the nation, the enormous bond issues approved have been almost all for *bonuses*. A case somewhat similar to the one at bar, heretofore referred to, was from California—"to acquire farms and homes." It is held in South Dakota that a statute authorizing loans to war veterans to enable them to purchase land is not a personal gratuity or donation, forbidden by the Constitution. *Wheelon v. South Dakota Land Settlement Board,* 43 S. D., 551, 181 N. W., 359; 14 A. L. R., 1145.

The present act is not a gift or gratuity, but a loan to worthy veterans—an easy method, financed by the State, to acquire homes. The selective draft took the young men first—just entering on their lifework, at the threshold of manhood, crippled their opportunities, gave small remuneration and made it practically impossible for them to acquire homes for themselves or families. The majority called to the colors were in service several years. Those that were not called, although "keeping the home fires burning," had chances for accumulation of wealth as never in the history of the country. Those that were called were the protectors of the life and property of the people of the Union of indivisible states. The contract for service under the selective draft was not mutual, but one-sided, fixed by the Government, and those called were compelled to respond and accept what was allowed them. Heretofore the wars that have been fought were mostly on our own soil and continent and close to homes, but in the history of the world no men have ever gone with more willingness and patriotic resolve (though some were drafted), thousands of miles from home and native land, across the Atlantic to another continent, to fight to destroy autocracy and make democracy. It was the world's crucial struggle. It is held by the United States Supreme Court, and the almost unanimous holding in the states of the Union, that there is an obligation, call it what you may, an implied contract, a legal or moral obligation, to recompense, reward and pension war veterans. In the *World War* this should extend to regulars, volunteers and those drafted from the respective states. In the present case it is merely a loan, requiring security, and must be paid back.

In *United States v. Hall,* 98 U. S., at p. 346, it is said: "Power to grant pensions is not controverted, nor can it well be, as it was exercised by the states and by the Continental Congress during the War of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption or question to the present time. . . . (p. 350). Such laws had their origin in the patriotic service, great hardship, severe suffering, and physical disabilities contracted while in the public service by the officers, soldiers, and seaman who spent their property, lost their health, and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation. . . . (p. 351). Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out."

Cooley, Taxation, Vol. I (4 ed.), at p. 459-460, says: "In most of the states, however, especially in the later decisions involving bounties to veterans of the World War, such bounties or bonuses have been upheld as being imposed for a public purpose, especially where the bonus is merely an educational bonus; and this includes bounties to Confederate veterans after the Civil War, to veterans of the 1916 Mexican trouble, and to veterans of the late World War. So an appropriation for the support of ex-army nurses and certain female relatives of veterans of the Civil War, in a Woman's Relief Corps Home, is held to be for a public purpose. The basis for upholding such legislation in favor of veterans has been variously ascribed to gratitude, benefits to the people of the State by protecting life and property, and the existence of a moral obligation to compensate for the public services rendered; and it makes no difference that the services were rendered primarily in behalf of the Federal and not of the State government."

What is a public purpose or general welfare or for "good of the whole" has given rise to no little judicial interpretation and consideration. Some courts have taken a liberal view, and to a great extent left it to the determination of the Legislature and referendum of popular vote, but we should ever be mindful that the Constitution to a great extent is the rudder to keep the ship of State from off the rocks and reefs. The question is Federal as well as state—the taking of money by taxation for private instead of public purposes is a violation of both the State and Federal Constitution (14th Amendment U. S. Const.).

The Supreme Court of the United States, in *Green v. Frazier,* 253 U. S., p. 233, sustained the Home Building Act of North Dakota, and held this legislation not to amount to a taking of property without due process of law.

Our own Court, in *R. R. v. Forbes, supra,* 188 N. C., at p. 155, said: "The Constitution, Art. II, sec. 7, directs that beneficent provision be made for the poor, the unfortunate, and the orphan, and the Court has said that the law providing pensions for persons disabled in war, and their widows, was enacted in the discharge of a legal as well as a moral obligation. *Board of Education v. Comrs.,* 113 N. C., 379, 383."

Finally, the plaintiff puts the query: "Is payment to a Federal soldier a public purpose of the State?" We are now considering those Federal soldiers, sailors and marines, drafted from the State, also regulars and volunteers mobilized to serve our allies in the World War. The cases heretofore cited holding the bonuses and loans valid, all answer in the affirmative. Our government is a dual system—a wheel within a wheel—a union of indivisible states—a family of states. The Constitution of the United States is the golden cord that binds the states together—"United we stand, divided we fall." This is the conception of our government. Any attack upon the Government of the United States by insurrection or invasion, in its broad sense, is also an attack on each and every state government in the Union. It is the duty of each state to furnish her quota to repel the attack, although Congress can alone declare war. The army and navy when raised and put into action, though the army and navy of the Union, is recruited by the states. To put down insurrection or invasion is a public benefit to every state as well as the Union. The war involved the safety and defense of every state and the Union. We are citizens of both our State and the United States. From the interwoven relation between the states and the Union, we are driven to the conclusion that payment to a soldier, sailor or marine serving in the American Army or Navy during the World War to repel invasion, under a liberal and just interpretation, is a public purpose of the State.

Animadverting to the question, it is well said in *S. v. Clausen, supra* (194 Pac. Rep., at p. 796): "In the spring of the year 1917 the aggressions of the Imperial German government had reached the point where the integrity of our institutions and the lives and property of the citizens of this country were in grave peril. Our ships had been sunk without cause upon the high seas, and our citizens killed while pursuing their lawful occupations. The matter, perhaps, cannot be better summed up than in the language of President Wilson in his address to the joint session of the two houses of Congress in (2) April, 1917, wherein, after reciting the illegal acts of the German nation, it was said: 'It is a war against all nations. American ships have been sunk, American lives taken, in ways which it has stirred us very deeply to learn of, but the ships and people of other neutral and friendly nations have been sunk and overwhelmed in the waters in the same way. There has been no discrimination. The challenge is to all mankind.' In the same address the President further said: 'We are accepting this challenge of hostile purpose because we know that in such a government, following such methods, we can never have a friend, and that in the presence of its organized power, always lying in wait to accomplish we know not what purpose, there can be no assured security for the democratic governments of the world.' Accordingly, on 6 April following, war was declared, and under acts of Congress the resources of this country, manual, economical, and financial, were coördinated for the purpose of meeting and overcoming the threatened peril and preserving the institutions of this country, and protecting the lives and property of the citizens thereof. It was into this cause that the men who are to receive compensation under the act in question entered under the selective draft. Services rendered in such a cause must necessarily be a public service."

In this famous war message, President Wilson proclaimed these principles as the ideals for which America would fight: "Our subject now, as then, is to vindicate the principles of peace and justice in the life of the world as against selfish and autocratic power, and to set up among the really free and self-governed peoples of the world such a concert of purpose and of action as will henceforth insure the observance of those principles. . . . The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty. We have no selfish ends to serve. We desire no conquests, no dominion. We seek no indemnities for ourselves, no material compensation for the sacrifices we shall freely make. We are but one of the champions of the rights of mankind. We shall be satisfied when those rights have been made as secure as the faith and the freedom of nations can make them."

In *S. v. Johnson, supra* (176 N. W. Rep., at p. 225), the patriotic utterance is as follows: "Its purpose was to show by material means, of such character and such proportion that it could not be misunderstood as mere idle expressions, the deep gratitude of the people of the State to those who so signally and heroically performed the task that called them into action, and who stamped the American, the Wisconsin, soldier as of the bravest and most efficient among the soldiers of the world. But this purpose, though public, appropriate, and laudable, was not the sole or even the main purpose of the act. The main purpose was to stimulate patriotism, to quicken the perception in our citizens that there is a sacred duty to defend the government in time of need, as well as to demonstrate that such defense is appreciated; that republics are not ungrateful."

We soon forget: In the most stupendous war ever waged on this earth, we take statistics from the United States War Department, compiled 25 February, 1924: Total mobilized forces of the Allies were 42,188,810, of which 4,355,000 were Americans. Total casualties 22,094,900, average per cent 52.3—over one-half. Total mobilized forces of the Central Powers, Germany and others, 22,850,000; total casualties 15,404,477, average per cent 67.4—over two-thirds. Grand total forces mobilized 65,038,810; grand total casualties 37,499,377—average per cent 57.6. American Army battle casualties, killed in action 37,568; died of wounds received in action 12,942; wounded, not mortally, 182,674; total 233,184.

Lest we forget: North Carolina furnished 86,550; total casualties 6,773—about 1/14th of those called to the colors.

Hindenburg made a line which he believed no troops on this earth could break. It is an accredited fact that it was the 30th Division, composed almost entirely of North Carolina, South Carolina, and Tennessee troops that first made the objective and broke this line—(117th, 118th, 119th and 120th Infantry). To lead the assault for the 30th Division, the 119th and 120th were chosen—a majority North Carolina men.

General John J. Pershing, Commander of the American Expeditionary Forces, in his final report, says: "The Second Army Corps, Major-General Read commanding, with the 27th and 30th Divisions on the British front, was assigned the task, in coöperation with the Australian Corps, of breaking the Hindenburg line at Le Cateau, where the San Quentin Canal passes through a tunnel under a ridge. In this attack, carried out on 29 September and 1 October (1918), *the 30th Division speedily broke through the main line of defense and captured all of its objectives,* while the 27th progressed until some of its elements reached Guoy."

General Sir John Monash, Commander of the Australian Corps, said: "The Corps Commander desires to make known to you this appreciation of the splendid fighting qualities of your division, and of the results accomplished in their part *in breaking this formidable portion of the Hindenburg line. It is undoubtedly due to the troops of this corps that the line was broken* and the operations now going on made possible. The unflinching determination of these men, their gallantry in battle and the results accomplished are an example for the future. They will have their place in history and must always be a source of pride to your people."

Sir Douglas Haig, Commander-in-Chief of the British, said: "On the 30th of September you took part with distinction in the *great and critical attack which shattered the enemy's resistance in the Hindenburg Line,* and opened the road to final victory. The deeds of the 27th and *30th American Divisions,* who on that day took Bellicourt and Nauroy, and so gallantly sustained the desperate struggle for Bony, will rank with the highest achievements of the war. They will always be remembered by the British regiments that fought beside you. I rejoice at the success which has attended your efforts, and am proud to have had you under my command."

Lest we forget: Seventy-eight Congressional medals of honor were given in the World War by the United States Government "For conspicuous gallantry and intrepidity above and beyond the call of duty in action with the enemy." Twelve men in the 30th Division from North Carolina, South Carolina and Tennessee received this medal—more than any other division. The three states, out of forty-eight in the Union, receiving 13 1/06 of the entire number.

Like the ex-soldier who argued this case for plaintiff, the American soldier responded to the call to colors, with a noble purpose to destroy the divine right of kings to rule, threatening the very life of this Republic, and to enthrone democracy—that equal rights and opportunities might prevail among all the people of the world, and that aristocracy of character may be the goal. Their reward was *duty well done.* A grateful people should ever remember their protectors. This is a legal and moral obligation, binding in law and conscience, and so considered from the foundation of this government, both in State and Nation.

This commonwealth has given no bonuses. A loan to purchase homes, to help make a State of home-owners, the foundation of stable government, is small recompense. Ten years ago the colors, the stars and stripes, were unfurled. Like the Crusaders of old, the heart of the Nation was stirred as never before, with the idea of service and sacrifice, that this gigantic struggle might end war by destroying autocracy and making democracy. The vision of the old prophet was the inspiration: "And he shall judge among the nations, and shall rebuke many people; and they shall beat their swords into plowshares, and their spears into pruninghooks; nation shall not lift up sword against nation, neither shall they learn war any more." And again the hope of fulfilling the ideal, when the world tuned in, and from Heaven was heard: "On earth, peace, good will toward men."

Our War President said, "The people of the world want peace, and they want it now, not merely by conquest of wars, but by agreement of mind. It was this uncomparably great object that brought me over seas." He died a martyr to this heroic purpose. Three thousand miles away, in the soil of France, rests the bodies of 30,000 Americans. In obedience they fell. Shall he and those heroes who died, die in vain?

"To you from falling hands we throw
The torch. Be yours to hold it high!
If you break faith with us who die,
We shall not sleep, though poppies grow
In Flanders Field."

Looking back we have a gesture towards a World Covenant of Peace, in which fifty-six nations have joined in a League of Nations, and only Russia, Mexico and the United States are outside. Like murder, the nations of the earth, by covenant, shall outlaw war.

The Loan Act for the World War Veterans, we think, constitutional.

The judgment of the court below is

Affirmed.

NORTH CAROLINA CORPORATION COMMISSION v. CITIZENS BANK AND TRUST COMPANY; FIDELITY AND DEPOSIT COMPANY OF MARYLAND, PETITIONER, v. LOUIS J. POISSON AND NORMAN C. SHEPARD, RECEIVERS.

(Filed 6 April, 1927.)

1. **States—Government — Sovereign Powers — Prerogative — Statutes—Banks—Receivers—Depositors—Debtor and Creditor — Priority of State's Claim.**

The English common law, giving a debt due to the sovereign a preference to the debts due to others, is abrogated by our statute, and is not in force in North Carolina, as applied to a debt due to the State. C. S., 970.

2. Same—Principal and Surety—Indemnity Bonds—Equity — Subrogation.

Where the State Treasurer has money on deposit in a bank that has since become insolvent, and in a receiver's hands, and the State has transferred all of its rights to a surety on an indemnity bond the Treasurer has required from the bank, the surety, on paying the State deposit to the Treasurer, cannot acquire by subrogation a priority of payment over the general depositors or creditors of the defunct bank, as no such right existed in the favor of the sovereign State, especially, as in this case, the State Treasurer had not asserted it before the appointment of the receiver.

STACY, C. J., took no part in the consideration or decision of this case.

APPEAL by the Fidelity and Deposit Company of Maryland, intervening petitioner, from a judgment of *Grady, J.,* given on 14 December, 1926, denying the relief prayed. The petitioner asks that it be subrogated to all the rights, equities and remedies of the State Treasurer and given priority of payment out of the effects of the insolvent Citizens Bank and Trust Company, which it is contended the State had by reason of its sovereignty. These are the agreed facts:

1. That the Citizens Bank and Trust Company was a banking corporation under the laws of the State of North Carolina, and that on or about 15 November, 1924, the said bank was closed by an order of the North Carolina Corporation Commission, and thereafter temporary receivers were appointed by an order entered in the above-entitled cause instituted for the purpose of appointment of receivers, and that on or about 18 December, 1924, these defendants were duly appointed permanent receivers in an order entered in the said cause, and have qualified according to law and are now acting in that capacity.

2. That the Citizens Bank and Trust Company was a duly designated depository for State funds, and at the time of the closing of the Citizens Bank and Trust Company in November, 1924, there was on deposit in the name of Benjamin R. Lacy, Treasurer of the State of North Carolina, $47,619.68; that the said sum of $47,619.68 was a general deposit and checking account of the Treasurer of the State of North Carolina, but there was on hand at the closing of the said bank less than $1,000 in cash.

3. That the Citizens Bank and Trust Company was required by the Treasurer of the State of North Carolina to file an indemnity bond in the sum of $50,000 for the protection of the said Treasurer because of said deposits, and that the said bond was furnished by the Citizens Bank and Trust Company with the Fidelity and Deposit Company of Maryland as surety.

4. That the Citizens Bank and Trust Company applied to the Fidelity and Deposit Company of Maryland for the indemnity bond required by the Treasurer of the State of North Carolina, and before signing the

said bond as surety, the Fidelity and Deposit Company of Maryland, by examination and otherwise, satisfied itself of the financial responsibility of the Citizens Bank and Trust Company, and thereupon executed the said indemnity bond conditioned as aforesaid for the protection of the Treasurer of the State of North Carolina, the Fidelity and Deposit Company of Maryland charging for the execution of the said bond as surety the usual premium charged for indemnity bonds of like amount, and no allowance was made in the premium so charged because the bond was executed by the Citizens Bank and Trust Company for the indemnification of the Treasurer of the State of North Carolina because of deposits in said bank.

5. That at the time of the closing of the bank in November, 1924, and at the date of the appointment of temporary receivers by an order of court thereafter, and the appointment of permanent receivers on 18 December, 1924, there had been no claim made by the State of North Carolina for the repayment of its deposit, nor had any action been taken seeking to enforce priority rights in the payment thereof before the payments to other depositors and creditors of said bank, and the Fidelity and Deposit Company made no demand nor took any action seeking to enforce such priority before the filing of the petition herein on or about the .... day of April, 1925.

6. That Benjamin R. Lacy, Treasurer of the State of North Carolina, called upon the Fidelity and Deposit Company of Maryland to perform its obligations in accordance with the terms of the said bond, and that thereafter on or about 20 March, 1925, the Fidelity and Deposit Company of Maryland did pay to the said Benjamin R. Lacy, Treasurer of the State of North Carolina, in performance of the terms of the said bond, the principal sum of $47,619.68, together with accrued interest of $708.47; and the said Benjamin R. Lacy, Treasurer of the State of North Carolina, did on or about the said date assign the said deposits in the said bank, together with all rights, equities and remedies growing out of the same, to the Fidelity and Deposit Company of Maryland.

The condition of the indemnity bond was as follows:

"Now, the condition of the above obligation is such, that if the above bound, the Citizens Bank and Trust Company of Wilmington, North Carolina, shall well and faithfully pay over upon demand all moneys belonging to said Benjamin R. Lacy, personally or as treasurer, or to those to whom he may, from time to time, personally or as treasurer, by check or draft or bill of exchange, direct payment to be made, all moneys which said Benjamin R. Lacy may, either personally or as Treasurer of the State of North Carolina, deposit with said the Citizens Bank and Trust Company, of Wilmington, N. C., which may in any manner come into its custody or possession, while acting as said

State depository, then this obligation to be void; otherwise to remain in full force and effect."

The Treasurer's assignment to the petitioner was in these words:

"Now, therefore, for and in consideration of the premises, and in the further consideration of $48,328.15, paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, the said party of the first part has transferred, assigned and set over, and by these presents does transfer, assign and set over to the party of the second part, its successors and assigns, all of the said deposits hereinbefore referred to, together with all rights, equities and remedies growing out of said deposits, by reason of the contractual relations between the party of the first part and the said Citizens Bank and Trust Company, but without abridgment or limitation of any rights, equities or remedies which the party of the second part may have independent of this agreement, and which it could have enforced by virtue of law if this agreement had not been made."

Judge Grady was of opinion that the petitioner was not entitled to have its claim filed with the receivers of the insolvent bank as a preference, the deposits being on open account, and that the State has no priority as an attribute of sovereignty in the collection of its debts; furthermore, that the receivers having been appointed and qualified before any claim was made or any proceeding was instituted took the assignment of the assets of the bank free from any lawful claim of priority. Thereupon it was adjudged that the petition be dismissed and that the receivers accept the petitioner's claim against the assets of the bank as one unsecured, to share pro rata with other general claims in the distribution of the bank's assets.

The intervening petitioner excepted and appealed.

Rountree & Carr for appellant.

Ed S. Abell and Norman C. Shepard for appellee.

ADAMS, J. The appeal presents for review the ruling of the trial court on these two questions: 1. Under the principles of the common law has the State, by reason of its sovereignty, the prerogative right to prefer its claim over the claims of other like depositors, for its deposits made on open account in a bank which has become insolvent? 2. If so, is the appellant, upon paying the amount due the State by the insolvent bank, entitled to be subrogated to the preferred rights of the State? The second question need not be considered if the first is answered in the negative.

Since the right, if existent, is derived by the State from the common law, we may first inquire into its origin and into the theory upon which it is founded. In reference to the royal prerogative, Coke says: "As to the third protection *cum clausula volumus,* the king by his prerogative regularly is to be preferred in payment of his duty or debt by his debtor before any subject, although the king's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli, et firmamentum pacis.* And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached until he paid the king's debt. But hereof grew some inconvenience, for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof it is enacted by the statute of 25 E. 3, that the other creditors may have their actions against the king's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts." Coke upon L., p. 131 b (1). See, also, Bacon's Abrd., 91; *Giles v. Grover,* 11 Eng. Rul. Cases, 549.

Whether the doctrine of the king's right to be preferred in the payment of debts due him was abrogated when the common law was adopted as the basis of American jurisprudence, or whether the functions and powers exercised by him in this respect devolve upon the several states, is a question concerning which there is divergence of opinion. The existence of the right has been maintained by the courts of New York, Montana, Minnesota, Georgia, West Virginia, Maryland, and others, and with equal emphasis it has been denied in New Jersey, Michigan, South Carolina, Mississippi, and others. *Re Carnegie Trust Co.* (N. Y.), 46 L. R. A. (N. S.), 260; *Marshall v. People,* 244 U. S., 380, 65 Law Ed., 315; *Ætna Co. v. Miller* (Mont.), L. R. A., 1918 C, 954; *Fidelity and Guaranty Co. v. Rainey,* 120 Tenn., 357; *Freeholders v. State Bank,* 29 N. J. Eq. Rep., 268; *S. c.,* 30 N. J. Eq. Rep., 311; *S. v. Harris,* 16 S. C., 598; *S. v. Cleary,* 2 Hill (S. C.), 267, 600; *Com. of Banking v. Bank,* 161 Mich., 691, 705; *Potter v. F. and D. Co.,* 101 Miss., 823; Annotation to *S. v. Foster,* 29 L. R. A., 243.

The theory on which the prerogative is upheld is thus stated in the case of *Carnegie Trust Co., supra:* "The king, therefore, and the prerogatives that were personal to him, being repugnant to our Constitution, are abrogated. But his sovereignty, powers, functions, and duties, in so far as they pertain to civil government, now devolve upon the people of the State, and consequently are not in conflict with any of the provisions of our Constitution. Inasmuch, therefore, as the claims or moneys due the king for the support and maintenance of the government, whether derived from taxes or other sources of income, were preferred over the claims of others, it follows that, under the first subdivision of the provision of the Constitution of 1777, quoted, such preference became a part of the common law of our State, and is so continued under our present Constitution."

On the other hand, in *Central Trust Co. v. Third Ave. R. Co.,* 186 Fed., 291, the Circuit Court of Appeals of the Second Circuit, affirming an order of the Circuit Court of the United States for the Southern District of New York, said: "We regard it as settled law in this State that the State does not succeed as sovereign to all the prerogatives of the British crown, among others, the right to a preference for debts due it over all other creditors." This conclusion was approved by the Circuit Court of Appeals, Ninth Circuit, in *Brown v. Am. Bonding Co.,* 210 Fed., 844.

Courts denying the right say that it should not be sustained in our jurisprudence as an attribute of sovereignty; that it is in fact an attribute of a despotic government; that it is contrary to the spirit of our institutions; that it is antagonistic to the fundamental principles of a government established by the people for their protection and security; and that it involves questions which call for the exercise of legislative power as an expression of the sovereign will.

As the doctrine under consideration springs from the ancient prerogative of the sovereign of England to prefer debts due the crown, it becomes necessary to ascertain whether the doctrine as embedded in the English law is a part of the common law as adopted in North Carolina; for all matters relative to its adoption in this country were left to the several states for determination, each state adopting such part of the common law as was consonant with its use and customs. 5 R. C. L., 811; *Van Ness v. Pacard,* 2 Peters, 137, 7 Law. Ed., 374.

In 1715 a statute was enacted for the Province of Carolina, declaring, "That the laws of England are the laws of this Government, so far as they are compatible with our way of living and trade" (23 State Records, 38, 39); and on 22 December, 1776, a few days after the adoption of the Constitution at Halifax, it was ordained that such parts of the common law theretofore in use and not destructive of, repugnant to, or inconsistent with the freedom and independence of the State, not abrogated, repealed, expired, or become obsolete should continue in force. 23 State Records, 992. Substantially the same provisions were in the Act of 1778 (24 State Records, 162), and are now in section 970 of the Consolidated Statutes.

As the earlier statutes went into effect, it became apparent that portions of the common law were inconsistent with the government established under the Constitution, and several decisions to this effect were rendered by the Supreme Court. *Baker v. Long,* 2 N. C., 1; *Sherrod v. Davis, ibid.,* 283; *White v. Frost,* 10 N. C., 251; *Barfield v. Combs,* 15 N. C., 514. In *Ætna Co. v. Miller, supra, Hoke v. Henderson,* 14 N. C., 12, is cited as holding that sundry prerogatives ascribed to the king at common law had passed to the states; and in *Fidelity and Guaranty Co. v. Rainey, supra,* it is said that in *Hoke v. Henderson* the right of the sovereign to priority of satisfaction out of the goods of the debtor is recognized. In *Hoke's case* the Court referred to "a string of cases cited to show that the execution of the king is entitled to the first satisfaction, unless the debtor's goods be actually sold under the subject's process, before the sovereign's is delivered." The question for decision, it was said, was different; and while the language may be construed as approving the general doctrine, it was not only *obiter,* but was followed by the declaration that "if the subject hath sold the goods of the king's debtor before the sovereign sues execution, the sale is not disturbed."

Our research has disclosed no case in which the prerogative has been applied by this Court as the controlling principle of decision under facts similar to those appearing in the record; and as suggested in *Freeholders v. State Bank, supra,* the fact that the right of preference has not been actually executed under such circumstances since the adoption of the Constitution of 1776 would seem to negative its existence in this State. Even if the right existed, there is strong reason for holding that upon appointment of the receivers the State lost its priority. *Natural Surety Co. v. Pixton,* 208 Pac., 878; *Ætna Co. v. Moore,* 181 Pac., 40; *State v. Bank,* L. R. A. (1918 A), 394; *Freeholders v. State Bank, supra.* For the reasons given, it is unnecessary to consider the latter of the two questions presented for review.

The judgment is
Affirmed.

STACY, C. J., took no part in the consideration or decision of this case.

BOARD OF EDUCATION OF ORANGE COUNTY v. THOMAS J. FORREST AND JAMES O. WEBB.

(Filed 6 April, 1927.)

1. **Statutes—Condemnation.**

   The statutory authority given the county board of education to condemn land for school purposes is in derogation of a common-law right, and its terms will be strictly construed as to the extent or limit of the power given.

2. **Eminent Domain — Condemnation — Appeal and Error — Schools—Board of Education—Party Aggrieved.**

   In an action brought by a county board of education to condemn lands for public school purposes, where the statute has been regularly followed as to the procedure, and accordingly the appraisers appointed have viewed the lands and made a report of the amount of damages to be paid to the owner: *Held*, the board of education does not come within the meaning of the words "party aggrieved" as contemplated by the statute, and in the absence of statutory provision allowing it, the board is not entitled to appeal to the courts on the ground of excessive damages, and the award so made is final. 3 C. S., 5469.

3. Same—Appeal and Error.

Under the provisions of 3 C. S., 5469, relating to appeals in the proceedings for condemnation of lands by the county board of education for public school purposes, by requiring that on appeal the party aggrieved by the award of the appraisers give to the board a bond on appeal, is construed to apply in case of appeal only to the person or persons whose land is so taken. C. S., 1715-1723, has no application to this case.

4. Constitutional Law—Trial by Jury—Statutes—Legislative Powers.

The policy for the preservation of the right to a trial by jury provided for by Art. I, sec. 19, of the State Constitution, respecting property rights, is ordinarily for the Legislature to declare.

BROGDEN, J., having been of counsel, took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Lyon, J.*, at October Term, 1926, of ORANGE. Affirmed.

The facts appear sufficiently in the judgment of the court below, as follows:

"This cause coming on for hearing upon an appeal and exceptions filed by the plaintiff to the award of appraisers in connection with the taking of a school site by the plaintiff, the court finds the following facts:

"1. That upon motion of Gattis & Gattis, attorneys for plaintiff, duly made before the clerk of this court in accordance with an order of Hon. W. A. Devin, judge, duly signed at the March Term, 1926, of the Superior Court of Orange County, said clerk did, on 27 March, 1926, duly appoint and designate H. J. Walker, S. T. Latta, Jr., and G. G. Bivins as appraisers to assess the value of the lot or tract of land described in the petition filed in this cause, containing a little over one acre of land belonging to the defendants.

"2. That in accordance with said appointment, the appraisers above named, to wit, H. J. Walker, G. G. Bivins, and S. T. Latta, Jr., did, on 29 March, 1926, submit a report in words and figures as follows: 'After being notified of our appointment, we proceeded, on 29 March, 1926, to go upon the premises described in the petition in this proceeding and appraised the said lot at the sum of $925; metes and bounds of said lot being the same as set out in the pleadings in this proceeding.' Said report was duly signed by each of the appraisers above named.

"3. That on 30 March, 1926, the clerk of the Superior Court, without notice to either party, did in all respects approve and confirm said report.

"4. That on 7 April, 1926, the plaintiff excepted to the report of the appraisers for the reasons, first, that said report gave too high a valuation, and that, second, said report did not appraise the lands as of the day of notice of *lis pendens* were filed, and from the order of the clerk confirming the said report, and appealed to the Superior Court at term.

"5. That on ...... April, 1926, the plaintiff deposited with the clerk of the Superior Court of Orange County the amount of $925, but did at said time instruct said clerk to retain possession of said money until this matter was finally determined. That immediately upon depositing said money in the office of the clerk of the Superior Court, the plaintiff did take physical actual control of the land described in the petition, having same leveled over and using same for its own purposes since that time.

"That the plaintiff in this matter is proceeding under the provisions and authority given by section 61 of chapter 136 of the Public Laws of 1923, which is now section 5469 of the Consolidated Statutes of North Carolina, as set forth in volume 3 thereof.

"Upon the foregoing facts found, the court being of the opinion that said section does not contemplate or provide for appeal by county board of education in cases similar to the one now under consideration, and that in such cases the award of the appraisers is final so far as the board of education is concerned, said board having the right to accept said appraisal, or if the same is unsatisfactory, then to not accept the land in question.

"It is therefore accordingly ordered, adjudged, and decreed that the defendants, T. J. Forrest and James O. Webb, having judgment against the board of education of Orange County in the amount of $925, together with interest on said sum from 30 March, 1926, until paid, and for the costs of this action as taxed by the clerk."

Gattis & Gattis for plaintiff.
R. O. Everett and A. H. Graham for defendant.

CLARKSON, J. This is a special proceedings, brought by plaintiff to condemn for school purposes certain lands of the defendants, under the provision and authority given by section 61 of chapter 136, Public Laws of 1923, 3 C. S., 5469. The sole question involved in the appeal is, Does the statute above, or the general law, give the right of appeal to the board of education from the valuation placed upon the land by the appraisers, or is the valuation final so far as the board of education is concerned? We are of the opinion the board of education has no right to appeal.

The language to be construed, upon the right of the board of education to appeal, is as follows: "The county board of education may receive by gift or by purchase suitable sites for schoolhouses or other school buildings. But whenever the board is unable to obtain a suitable site for a school or school building by gift or purchase, the board shall report to the county superintendent of public instruction, who shall, upon five days notice to the owner or owners of the land, apply to the clerk of the Superior Court of the county in which the land is situated for the appointment of three appraisers, who shall lay off by metes and bounds not more than ten acres, and shall assess the value thereof. They shall make a written report of their proceedings, to be signed by them, or by a majority of them, to the clerk within five days of their appointment, who shall enter the same upon the records of the court. The appraisers and officers shall serve without compensation. If the report is confirmed by the clerk, the chairman and the secretary of the board shall issue an order on the treasurer of the county school fund, in favor of the owner of the land thus laid off, and upon the payment, or offer of payment, of this order, the title to such land shall vest in fee simple in the corporation. *Any person aggrieved by the action of the appraisers may appeal to the Superior Court in term, upon giving bond to secure the board against such costs as may be incurred on account of the appeal not being prosecuted with effect."* 3 C. S., part of sec. 5469.

The board of education is the actor. It is taking private property for public purpose. Acts of this nature are strictly construed.

In *Griffith v. R. R.,* 191 N. C., 84, at p. 89, *Brogden, J.,* in writing the opinion of the Court, says: "The rule is stated thus in *R. R. v. Lumber Co.,* 132 N. C., 652: 'In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the Government, is a derogation of the ordinary rights of private ownership and the control which the owner usually has of his property.' "

Construing a statute somewhat similar, in *R. R. v. Jones,* 23 N. C., p. 24, *Gaston, J.,* said: "The mode of proceeding was intended to be summary, cheap, and expeditious."

Plaintiff in its prayer says: "Wherefore, plaintiff (board of education of Orange County) prays the court to appoint three disinterested persons as appraisers to lay off said lot by metes and bounds and assess the value thereof, and that the same be declared to be the property of the plaintiff, and for such other relief as it may be entitled." All this was done on the petition of plaintiff.

Aggrieved does not apply to the board of education, as the statute plainly says the person aggrieved can appeal, by giving bond to secure the *board,* clearly meaning the board of education. The statute gave no right to the board of education to appeal.

C. S., 3949 (6). Rules of Construction of Statutes, in part, is as follows: "The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, *unless the context clearly shows to the contrary.*" We think the context clearly shows to the contrary.

The Const. of N. C., Art. I, sec. 19, says: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The policy respecting property is for the Legislative Department of Government, which should ever be mindful of the wisdom of ages as expressed in the Constitution.

In *Dickson v. Perkins,* 172 N. C., p. 362, speaking to the question, it is said: "It is further insisted that the statute is invalid because no proper provision is made for an appeal on the question of damages. If this be conceded as the correct interpretation of the statute, it is very generally held that, unless in violation of some express constitutional provision, the Legislature may make the award of appraisers final as to the amount of damages. *R. R. v. Ely,* 95 N. C., 77; *R. R. v. Jones,* 23 N. C., 24; *Ross v. Board Sup.,* 128 Iowa, 427; 2 Lewis Eminent Domain, sec. 787." *Hartsfield v. New Bern,* 186 N. C., p. 142.

It is contended that the clerk approved and confirmed the award of the appraisers without notice. It is always important that notice be given, but in the present case it was waived. Plaintiff took actual possession—*pedis possessio*—of the land from defendants, and deposited the amount of award with the clerk. *In re Baker,* 187 N. C., p. 257.

The general law under "Eminent Domain," C. S., 1715-1723, is in no wise applicable. Plaintiffs' rights are controlled by authority given in 3 C. S., 5469. The allegations in the pleadings all show the proceedings were instituted under and plaintiff relied on C. S., 5469, *supra.* In fact, C. S., 1715, refers to corporations enumerated in C. S., 1706, among them—(5). County boards of education, "in order to obtain a pure and adequate water supply for such school," etc.

C. S., 1723, says: ". . . The corporation, or any person interested in the said land, may file exceptions to said report," and again, "Either party to the proceedings may appeal . . ." Nor does C. S., 1723, provide that a bond shall be given by a person appealing to protect the board, as does C. S., 5469, *supra.* This case was here before—see *Board of Education v. Forrest,* 190 N. C., p. 753.

We can find no error in the judgment of the court below.

Affirmed.

BROGDEN, J., having been of counsel, took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA Ex Rel. GREENE COUNTY, Etc., v. NATIONAL BANK OF SNOW HILL, Receiver, et al.

(Filed 13 April, 1927.)

1. **Debtor and Creditor—Contracts—Guarantor of Payment—Assignment.**

   Where the parties contract to pay a particular or specified debt of another, it is a guaranty of payment, and assignable by the one to whom it has been made.

2. **Same—Banks and Banking—State Deposit—Principal and Surety—Indemnity Bonds—Statutes.**

   Where the State Highway Commission has received money from a county to build a certain road therein, and has required from a local bank in which the deposit had been made a bond indemnifying it against loss, and after abandoning the project has transferred the fund to the county assigning to the latter the security of the bond: *Held*, the sureties on the bond are liable to the county for the loss of the funds upon the failure of the bank of deposit, or of its successor bank, after its reorganization, that had assumed its liabilities.

3. **Contracts—Indemnity Bonds—Courts—Intent — Interpretation —Expression of the Parties.**

   The interpretation of a bond of indemnity reciting the purpose for which it was taken will ordinarily be given controlling significance by the Court in construing the intent of the parties thereto.

4. **Demurrer—Evidence—Statutes.**

   A demurrer to the evidence will not be sustained if it is sufficient under a liberal construction to sustain the plaintiff's action. C. S., 535.

Appeal by individual defendants from *Nunn, J.*, at chambers, New Bern, N. C., 27 December, 1926. From Greene.

Civil action to recover a deposit of $300,000, and to hold the defendants liable for the payment thereof, first, by reason of the official bond, in the penal sum of $25,000, given by the financial agent of Greene County with the Fidelity and Deposit Company of Maryland as surety thereon, and, second, because of the following terms contained in a surety bond, given for the full amount of said deposit and duly signed by the individual defendants, appellants herein:

"The condition of this bond is such that, whereas the North Carolina State Highway Commission has on deposit in the First National Bank of Snow Hill, North Carolina, the sum of three hundred thousand dollars ($300,000), and we, the undersigned, jointly and severally undertake, promise, and agree to save harmless, in all respects, the North Carolina State Highway Commission, because and on account of any deposit that has been, is now on deposit, or may hereafter be made with the First National Bank of Snow Hill, North Carolina, and we hereby guarantee unto the said North Carolina State Highway Commission the payment, upon demand, of any funds of the North Carolina State Highway Commission now deposited in the First National Bank of Snow Hill, North Carolina, or that may hereafter be deposited therein by the North Carolina State Highway Commission, or any authorized officer thereof, it being the purpose and intention of the undersigned, by these presents, to bind ourselves, and each of them jointly and severally, to the payment of any funds now on deposit, or that may hereafter be put on deposit in the First National Bank of Snow Hill, North Carolina, by the North Carolina State Highway Commission."

The facts are that on 29 November, 1922, the commissioners of Greene County placed to the credit of the State Highway Commission, in the First National Bank of Snow Hill, the sum of $300,000, to be used in the construction of certain roads in said county. A month later, as appears from the date of the bond, the State Highway Commission caused the said First National Bank of Snow Hill to have prepared and executed the bond aforesaid, and delivered to it as a protection against loss on account of or by reason of said deposit.

Later, the First National Bank of Snow Hill, by action of its directors, went out of business, and the Bank of Greene was organized and took over all of its assets and assumed all of its liabilities.

In July, 1925, the State Highway Commission and the county of Greene entered into an agreement whereby the State Highway Commission was relieved of its obligation to build said roads as aforesaid, and the commission thereupon returned or transferred and assigned to the county of Greene the deposit above mentioned, and, at the same time, by written memorandum, duly transferred and assigned to the county of Greene the bond executed by the individual defendants as a protection against loss on account of or by reason of said deposit as aforesaid. In August following, the county made demand upon the Bank of Greene, successor to the First National Bank, for the said deposit, and accrued interest thereon, but the bank failed and refused to make payment. This suit is to enforce collection.

It is further alleged that the Bank of Greene is utterly insolvent; that the First National Bank of Snow Hill no longer exists; and that the directors of the Bank of Greene "are all, or in large part, the same as the sureties on the special bond hereinbefore set forth," etc.

From a judgment sustaining the demurrer interposed by the Fidelity and Deposit Company of Maryland (presumably *ore tenus,* as the record discloses no written demurrer by said defendant, though reference is made in the judgment to "the demurrer of the Fidelity and Deposit Company of Maryland herein filed"), and overruling the written demurrer filed by the individual defendants, the said individual defendants appeal, assigning error.

J. A. Albritton, Albion Dunn, and Cowper, Whitaker & Allen for plaintiffs.

J. Paul Frizzelle and L. I. Moore for defendants.

STACY, C. J., after stating the case: The answer to the question raised by the demurrer of the individual defendants depends upon whether the bond signed by them is one of strict suretyship, specially limited to the State Highway Commission, and therefore nonassignable, or whether it is a general guaranty of payment, assignable with the transfer of the deposit it was given to secure.

We concur in the view taken by the trial court, that the bond in question partakes of the nature of a general guaranty of payment, and is assignable with the debt it was given to secure. 2 R. C. L., 593-601; *Trust Co. v. Construction Co.,* 191 N. C., p. 667. For present purposes, it is sufficient to say that a guaranty of payment is an absolute or unconditional promise to pay some particular debt, if not paid by the principal debtor at maturity (*Jones v. Ashford,* 79 N. C., 173), and it is generally held that such a guaranty is assignable and enforceable by the same persons who are entitled to enforce the principal obligation, which it is given to secure. 28 C. J., 950; 5 C. J., 948; *Sykes v. Everett,* 167 N. C., p. 608; *Bank v. Libbey,* 101 Wis., 193; *Ellsworth v. Harmon,* 101 Ill., 274; *Claflin v. Ostrom,* 54 N. Y., 581; *Stillman v. Northrup,* 109 N. Y., 475; *Everson v. Gere,* 122 N. Y., 290; *Lane v. Duchac,* 73 Wis., 655; *Kimball Co. v. Mellon,* 80 Wis., 143.

Speaking of the distinction between a guaranty of payment and a guaranty of collection in *Cowan v. Roberts,* 134 N. C., 415, *Walker, J.,* delivering the opinion of the Court, said: "A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. *Carpenter v. Wall,* 20 N. C., 279. There is a well-defined distinction between a guaranty of payment and a guaranty for the collection of a debt, the former being an absolute promise to pay the debt at maturity, if not paid by the principal debtor, when the guarantee may bring an action at once against the guarantor, and the latter being a promise to pay the debt upon condition that the guarantee diligently prosecuted the principal debtor for the recovery of the debt, without success. *Jones v. Ashford,* 79 N. C., 172; *Jenkins v. Wilkinson,* 107 N. C., 707; 22 Am. St., 911."

It would seem that the conversion of the First National Bank of Snow Hill into the Bank of Greene, viewing the allegations of the complaint in this respect as true, did not destroy or affect the guaranty of the individual defendants so far as their liability had become fixed at the time when the First National Bank of Snow Hill gave up its charter under the national law and assumed the status of a State bank under the State law. *City Nat. Bank of Poughkeepsie v. Phelps,* 86 N. Y., 484; *First Soc. M. E. Church v. Brownell,* 5 Hun., 464.

It will be observed that in the latter part of the "condition" of the bond, as above set out, the parties themselves undertake to place an interpretation upon its meaning, "it being the purpose and intent of the undersigned, by these presents, to bind ourselves, and each of them jointly and severally to the payment of any funds now on deposit, or that may hereafter be put on deposit in the First National Bank of Snow Hill, North Carolina, by the North Carolina Highway Commission," which would seem to import without doubt a general guaranty of payment, and it is the general rule of construction that where, from the language employed in a contract, a question of doubtful meaning arises, and it appears that the parties themselves have interpreted their contract, practically or otherwise, the courts will ordinarily follow such interpretation, for it is to be presumed that the parties to a contract know best what was meant by its terms, and are least liable to be mistaken as to its purpose and intent. *Wearn v. R. R.,* 191 N. C., p. 580; *Lewis v. Nunn,* 180 N. C., 164; *Guy v. Bullard,* 178 N. C., 228; *Plumbing Co. v. Hall,* 136 N. C., 530; 2 Williston on Contracts, sec. 623; 13 C. J., 546; 6 R. C. L., 852.

The liability of the individual defendants, we apprehend, is not affected by the fact that the bond in suit was not signed by the principal, though this question was not debated on the argument, nor is it discussed in the briefs. *Clark v. Bank of Hennessey,* 14 Okla., 572; 2 Ann. Cas., 219, and note. See, also, Notes: 22 Ann. Cas., 1014; Ann. Cas. 1917 C, 1073.

We forego any further discussion of the case, as it is here on demurrer, and the defendants have not yet answered. They may plead, for aught we know, that the bond in suit was intended to be personal to the State Highway Commission, and ask for a reformation in its terms. *Stillman v. Northrup,* 109 N. Y., 473. Furthermore, when the language of an instrument is ambiguous and does not furnish conclusive evidence of its meaning, the courts are permitted to look at all the circumstances of the case and arrive at the intention of the parties from these sources of information. *Evansville Nat. Bank v. Kaufmann,* 93 N. Y., 273. But when a case is presented on demurrer, we are required by the statute, C. S., 535, to construe the complaint liberally, "with a view to substantial justice between the parties," and in enforcing this provision we have adopted the rule "that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." *Dixon v. Green,* 178 N. C., p. 209. See, also, *Lee v. Thornton,* 171 N. C., 209; *Renn v. R. R,* 170 N. C., 128; *Brewer v. Wynne,* 154 N. C., 467; *Blackmore v. Winders,* 144 N. C., 212.

It follows, therefore, from what is said above, that the demurrer interposed by the appealing defendants was properly overruled. *Mudge v. Varner,* 146 N. C., 147; *Voorhees v. Porter,* 134 N. C., 591; *Jenkins v. Wilkinson,* 107 N. C., 707.

Affirmed.

PAGE TRUST COMPANY v. AMERICAN NATIONAL BANK ET AL.

(Filed 13 April, 1927.)

Evidence—Demurrer—Equity—Reformation of Instruments — Cross-Action—Defenses.

Where equity is sought to remove a cloud upon title to lands by those claiming the reformation of their conveyance into a deed conveying a fee simple absolute title by reason of judgment liens against the former owner obtained subsequent to the registration of the plaintiff's deed, and the defendants, the judgment creditors, set up a cross-action asking affirmative relief on the grounds of fraud against their rights, and therefore no title had passed to the plaintiff, with evidence to support their allegations, plaintiff's demurrer to the defendant's evidence admits every material fact reasonably to be inferred therefrom, and the validity of the plaintiff's title being directly involved, the plaintiff's demurrer thus interposed is bad, and is properly denied.

STACY, C. J., not sitting.

CIVIL ACTION, tried before *Bond, J.,* at Spring Term, 1927, of NEW HANOVER.

It was alleged in the complaint that on 31 December, 1919, William H. Duls and wife conveyed the land in controversy to J. C. Rourk, trustee. This deed was duly recorded. J. C. Rourk, trustee, conveyed the land to W. H. Sanders, trustee, by deed dated 12 March, 1923, and duly recorded. W. H. Sanders, trustee, conveyed the land to plaintiff, Page Trust Company, by deed dated 10 November, 1926, and duly recorded.

Paragraph six of the complaint is as follows: "That the plaintiff is informed and believes, and upon such information and belief alleges that the said J. C. Rourk, trustee, in taking title to the said lands and premises described in the said deed from William H. Duls and wife, Theresa Marshall Duls, took said lands, and all of them, . . . as trustee for the said J. C. Rourk and Thomas E. Cooper, and for no other person, firm, corporation, or individual."

Plaintiff further alleged "that when the said J. C. Rourk, trustee, conveyed the lands and premises described in the third article of this complaint to W. H. Sanders, trustee, by deed dated 12 March, 1923, that he was requested, directed, and instructed so to do by the said Thomas E. Cooper and the said J. C. Rourk, *cestui que trustents,* and that their failure to join in the execution of said deed with the said J. C. Rourk, trustee, together with their wives, was an inadvertence and oversight, and contrary to their firm intention and purpose so to do; that the said J. C. Rourk, trustee, and the said defendants, Thomas E. Cooper and J. C. Rourk, intended to convey the lands and premises in fee simple, including every interest therein, to the said W. H. Sanders, trustee; that said lands and premises were conveyed by said J. C. Rourk, trustee, to said W. H. Sanders, trustee, for a valuable consideration, it being the purpose of said J. C. Rourk, trustee, to vest in the said W. H. Sanders, trustee, the legal and equitable title to the same, pursuant to the authority vested in him and in accordance with the directions of his *cestui que trustents.*"

Plaintiff further alleged that the defendant American National Bank, and a number of other creditors, were judgment creditors of Thomas E. Cooper and J. C. Rourk, "having acquired judgments since the date and registration of the deed from Joseph C. Rourk, trustee, to W. H. Sanders, trustee, aforesaid." Plaintiff further alleged that these judgments constituted a cloud upon its title, and prayed that a decree be entered removing said cloud upon its title, and declaring the plaintiff to be the owner in fee simple of the lands described, and that said Thomas E. Cooper and J. C. Rourk and wife, and all of said judgment creditors, be forever barred from asserting any right or title whatsoever in the land.

The American National Bank filed an answer, alleging in substance: (1) That Thomas E. Cooper and J. C. Rourk are still the owners of said property, and have never conveyed the same; (2) that the conveyance from W. H. Sanders, trustee, to the plaintiff was not a genuine conveyance in law and equity, and that no legal or equitable title passed from said J. C. Rourk, trustee, to Sanders, trustee, or from Sanders, trustee, to plaintiff.

The Citizens Bank and Trust Company, another judgment creditor, filed an answer, alleging in substance: (1) That the conveyance from J. C. Rourk, trustee, to W. H. Sanders, trustee, was without consideration, and "for the purpose of securing the payment of past-due debt in fraud of other creditors of said Thomas E. Cooper and J. C. Rourk; (2) that there was no misunderstanding, inadvertence, oversight, or mistake in the execution of said deed, and that the judgment taken by it against Cooper and Rourk was for indebtedness past due and owing at the time of the execution of the deed from Rourk, trustee, to Sanders, trustee; (3) that both Rourk and Cooper were insolvent, and that the land in controversy was the only available assets; (4) that the plaintiff in this action acquired title to said land from Sanders, trustee, with full knowledge of all the facts and circumstances.

Thereupon the judgment creditors prayed that the deed from Rourk, trustee, to Sanders, trustee, be set aside, and that Rourk and Cooper be adjudged to be the owners of the land.

The plaintiff filed demurrers to the further defense set up by the judgment creditors, American National Bank and Citizens Bank and Trust Company. The demurrers asserted that the judgment creditors were neither the owners of a legal nor equitable estate or interest in the lands in controversy, and that their further defense constituted a collateral attack upon the deed. The trial judge overruled the demurrers and refused to strike out the further defense and cross-bills asserted by the judgment creditors, and the plaintiff appealed.

Joseph W. Little for plaintiff.

L. J. Poisson and Norman C. Shepard for defendants.

Emmett H. Bellamy in behalf of American National Bank of Richmond, Va.

BROGDEN, J. The gist of the action instituted by plaintiff is to reform the deed in controversy to remove the lien of the docketed judgments, which it alleges constitutes a cloud upon the title.

The judgment creditors allege as a defense to said action, and as a basis for affirmative relief, that the deed from Rourk, trustee, to Sanders was executed without consideration and in fraud of creditors, and that, as a matter of fact, the land in controversy still belongs to Thomas E. Cooper and J. C. Rourk, who are insolvent, and that this parcel of land constitutes the only available assets owned by said insolvents.

The demurrers to the cross-action of defendant admit the truth of said allegations. It has been repeatedly held by this Court that "a demurrer to an action admits as true every material fact alleged in the answer to the same extent and with the same force as a demurrer to a complaint." *Trust Co. v. Wilson,* 182 N. C., 168; *Real Estate Co. v. Fowler,* 191 N. C., 616.

Therefore, assuming these allegations to be true, the defendant would have the right to have the land in controversy subjected to the payment of their judgments in accordance with law. *Murchison v. Williams,* 71

N. C., 135; *Bryan v. Dunn,* 120 N. C., 36; *Eaton v. Doub,* 190 N. C., 14; *Farrow v. Ins. Co.,* 192 N. C., 148.

Moreover, the cross-bill of defendant does not constitute a collateral attack upon the deed. In defining a "direct proceeding," in *Houser v. Bonsal,* 149 N. C., p. 57, *Hoke, J.,* said: "That under our present system, where courts are empowered to administer full relief in one and the same action, when all the parties to be affected by the decree are before the court, and a judgment is set up in bar and directly assailed in the proceeding for fraud, this is a direct and proper proceeding to determine its validity."

So, in this case the plaintiff comes into a court of equity alleging that his deed is defective, and praying for equitable relief for the purpose of reforming it, in order to remove a cloud upon the title. Thereupon, in the same action, the defendant asserts that the deed was given without consideration and in fraud of creditors, the plaintiff having notice thereof.

We are of the opinion that this is not a collateral attack upon the deed and that the demurrers were properly overruled.

Affirmed.

STACY, C. J., not sitting.

LIBERTY CHAIR COMPANY v. W. S. CRAWFORD ET AL.

(Filed 13 April, 1927.)

Evidence—Letters—Carbon Copies.

Unsigned carbon copies of letters are incompetent evidence of their contents without identification as to the person against whose interest on the trial they are sought to be introduced. The general requirements as to the competency of letters as evidence, when mailed, the identification of the writer, their mailing and receipt, notice to produce, etc., stated by BROGDEN, J.

CIVIL ACTION, tried before *Daniels, J.,* at November Term, 1926, of ALAMANCE.

The plaintiff instituted an action against the defendants to recover the sum of $1,003 upon an open account and upon notes executed by the defendants to the plaintiff. The defendants admitted the execution of the notes, but set up a counterclaim for damages for breach of contract. The case was tried in the county court of Alamance, and judgment rendered for the plaintiff.

The defendants assigned certain errors, growing out of the trial in the county court, and these assignments of error were heard by *Daniels, J.*, at the November Term of the Superior Court. Judge Daniels sustained exceptions one, five, and six filed by the defendants, and awarded a new trial, remanding the case to the county court for such purpose.

From the order of the Superior Court, the plaintiff appealed.

Carroll & Carroll for plaintiff.
No counsel for defendants.

BROGDEN, J. Are unsigned carbon copies of letters admissible in evidence?

The record discloses that in the trial court nine unsigned carbon copies of letters were introduced in evidence, purporting to be written by the plaintiff to the defendants. The trial court, over the objection of the defendants, admitted the letters in evidence, and upon hearing said objection before Judge Daniels, he sustained defendants' objection and awarded a new trial upon the ground that said evidence was incompetent.

The courts have established certain fundamental principles regulating the introduction of letters, and copies thereof. Some of the controlling principles declared by this Court are:

(1) When a letter is properly addressed, with the required postage thereon, and properly placed in the mail, it is presumed that it was received by the person to whom it was addressed. *Beard v. R. R.*, 143 N. C., 137; *Mahoney v. Osborne,* 189 N. C., 445.

(2) When the writing is in the possession of the adverse party, who refuses to produce it, secondary evidence of its contents may be given, even when the contents are directly in issue. *S. v. Wilkerson,* 98 N. C., 696; *Pollock v. Wilcox,* 68 N. C., 47; *Mahoney v. Osborne,* 189 N. C., 445.

(3) If the writing is in the possession of the adverse party, notice to produce it must be given to authorize the introduction of secondary evidence thereof. *Nicholson v. Hilliard,* 6 N. C., 270; *Overman v. Clemmons,* 19 N. C., 185; *Robards v. McLean,* 30 N. C., 522; *Ivey v. Cotton Mills,* 143 N. C., 189.

(4) If a letter has been received and lost, parol evidence of its contents is admissible, provided the party offering the contents can show affirmatively to the satisfaction of the court the loss thereof, proper and sufficient search therefor, and the existence of all such facts as are necessary to make secondary evidence competent. *Gillis v. R. R.*, 108 N. C., 444; *Avery v. Stewart,* 134 N. C., 287; *Mitchell v. Garrett,* 140 N. C., 397; *Greene v. Grocery Co.,* 159 N. C., 121; *Bank v. Brickhouse, ante,* 231.

(5) Reasonable and timely notice to produce letters must be given the adverse party. *Sermons v. Allen,* 184 N. C., 127; *Mahoney v. Osborne,* 189 N. C., 445.

(6) A letter received in due course of mail, purporting to be written by a person in answer to a letter proved to have been sent him, is prima facie genuine, and is admissible in evidence without proof of the handwriting, or further proof of its authenticity. *Echerd v. Viele,* 164 N. C., 122.

(7) While the presumption is that an addressee receives a letter that is properly addressed, stamped and mailed, yet the receipt of a letter purporting to be signed by a person is no evidence that it was written by such person. *Beard v. R. R.,* 143 N. C., 136; *Arndt v. Ins. Co.,* 176 N. C., 652.

(8) A letter is not admissible in evidence until satisfactory proof has first been made of its authenticity. *Arndt v. Ins. Co.,* 176 N. C., 652; *Bank v. Brickhouse, ante,* 231.

(9) If a person admits that a copy shown him is a correct transcript of the original, then, as against him, it should be admissible in evidence. *Beard v. R. R.,* 143 N. C., 136.

(10) Carbon copies of letters made at the same time and by the same mechanical operation as the original are considered as duplicate originals, and are therefore admissible in evidence without notice to produce the original. *Gravel Co. v. Casualty Co.,* 191 N. C., 313; *McLendon v. Ebbs,* 173 N. C., 603; *Beard v. R. R.,* 143 N. C., 136. It has also been held that a letter-press copy is a duplicate original.

The carbon copies of the letters offered in evidence by the plaintiff were unsigned, and there was no evidence that they were made at the same time or by the same mechanical operation as the originals, or that the originals had been properly mailed, stamped and addressed to the defendants, or that they had received them, and there was no notice to the defendants to produce the originals. The only evidence of identification was the following statement of a witness for the plaintiff: "This correspondence is letters from me and from Crawford and Straughn in regard to this matter."

We are of the opinion, and so hold, that the evidence of identification of the carbon copies was not sufficient, and that Judge Daniels was correct in sustaining the objection of defendants to their introduction in evidence.

Affirmed.

NEW BERN TIRE COMPANY v. KIRKMAN & COBB., INC., AND B. W. KIRKMAN, B. F. COBB, T. A. GLASCOCK, AND L. L. GLASCOCK.

(Filed 13 April, 1927.)

1. **Corporations—Issuance of Shares of Stock for an Existing Business—Shareholders—Individual Liability.**

   In the absence of fraud, the determination of the board of directors as to the value of the business of a partnership to the partners of which shares of stock had been issued therefor, is conclusive, in an action to enforce individual liability against the partners upon the ground that the assets were of insufficient value to purchase the shares of stock.

2. **Same—Burden of Proof.**

   The burden of proof is upon the partners to show that the partnership business given for the shares of stock issued by a corporation formed to take it over, was a sufficient consideration for the transaction.

APPEAL by plaintiff from *Sinclair, J.,* at October Term, 1926, of CRAVEN. No error.

Upon the verdict rendered upon the trial of this action, plaintiff is entitled to recover of defendant, Kirkman & Cobb, Inc., a corporation organized and doing business under the laws of the State of North Carolina, the sum of $354, with interest from 2 December, 1923.

The liability of the individual defendants, stockholders in said corporation, to plaintiff for said sum was determined by the answer of the jury to the eighth issue, which was as follows:

"8. Did the defendants, individuals, pay into the defendant company eight thousand dollars in money, or money's worth, at the time of the incorporation? Answer: 'Yes.'"

From judgment that plaintiff recover of the corporation the sum of $354, with interest from 2 December, 1923, and that the individual defendants go without day and recover of plaintiff their costs, to be taxed by the clerk, plaintiff appealed to the Supreme Court, assigning as error the instruction of the court to the jury with respect to the eighth issue.

Guion & Guion for plaintiff.
Ward & Ward for defendants.

CONNOR, J. For about one year prior to January, 1923, the individual defendants in this action were engaged in the business of buying and selling automobiles at Greensboro, N. C., as partners, under the firm name of Kirkman & Cobb. Upon the formation of said partnership, in February, 1922, each of the four partners had paid in, as his contribution to the capital of said partnership, the sum of $1,000 in cash. The business conducted by the partnership was successful. An inventory taken in December, 1922, showed that at that time its assets exceeded its liabilities by something more than $8,000.

In January, 1923, a corporation was organized pursuant to a certificate of incorporation issued by the Secretary of State of North Carolina. The name of this corporation was Kirkman & Cobb, Inc.; its capital stock was subscribed for by the individual defendants herein, each defendant subscribing for 20 shares, of the par value of $2,000. The corporation was organized for the purpose of taking over the business of the partnership.

At the first meeting of the stockholders of the corporation, a resolution was adopted, and entered upon the minutes of the meeting, authorizing the directors to accept the offer of the partnership to sell its assets, including its good will, to the corporation for $8,000, the purchase price to be paid for in stock. This resolution recites that the assets of the partnership had been appraised as worth $8,000.

Pursuant to said resolution, the directors, at their first meeting, accepted the said offer of the partnership, and authorized, empowered, and directed the president and secretary and treasurer of said corporation to deliver to each of the partners a certificate for 20 shares of the capital stock of said corporation. These certificates were thereafter issued; the corporation thus acquired all the assets of the partnership, paying therefor the sum of $8,000, by certificates of stock, aggregating the sum of $8,000.

Kirkman & Cobb, Inc., was not successful in the conduct of its business as a dealer in automobiles; it lost money, and ceased to do business during January, 1924. Both transactions upon which plaintiff recovered in this action occurred after the organization of the corporation.

Upon the eighth issue, the court instructed the jury that the burden was upon defendants to show that the property which they sold and delivered to the corporation, in exchange for its stock, was worth the sum of $8,000, the par value of the stock subscribed for by them; that under the provisions of the statute the judgment of the directors of the corporation as to the value of the property purchased by the corporation and paid for by its stock was final and conclusive, in the absence of actual fraud.

The court further instructed the jury that there was no evidence of actual fraud, and that if they found the facts to be as shown by all the evidence, they would answer the eighth issue "Yes."

Plaintiff's assignment of error, based upon his exception to this instruction, cannot be sustained. If the jury should find from all the evidence that the directors, at the time they accepted the offer of the partnership to sell the corporation its assets in exchange for its stock of the par value of $8,000, found that the assets were worth the sum of $8,000, then the judgment of the directors, as to the value of the assets, is final and conclusive. This evidence, offered by defendants by virtue of the statute, required an affirmative answer to the issue, unless there was evidence from which the jury could find actual fraud in the transaction. We concur with the court that there was no evidence from which the jury could find that there was actual fraud.

In *Goodman v. White,* 174 N. C., 399, *Brown, J.,* says: "The burden of proof upon a plea of payment is on the one pleading it, the defendant in this case. He admits that the stock was not paid for in money, but in property. He must therefore establish that the property was taken in payment at its true value; and further, that such value was approved by the board of directors, acting independently in the interest of the corporation, whose judgment is conclusive, except in case of fraud."

In *Gover v. Malever,* 187 N. C., 774, it is said in the opinion of the Court: "It will be observed that the statute gives to the defendant's evidence, when his case is brought within its terms, as it is here, an arbitrary and artificial weight, making the judgment of the directors as to the value of the property, etc., conclusive in the absence of fraud. Hence, in the absence of any evidence tending to show fraud in the transaction, there would be no mooted question for the jury."

The instruction of the court is well supported by authoritative decisions of this Court, construing and applying C. S., 1157, and C. S., 1158. *Gover v. Malever,* 187 N. C., 774; *Goodman v. White,* 174 N. C., 399; *Whitlock v. Alexander,* 160 N. C., 465.

Any corporation organized under the laws of this State may purchase property necessary for its business and pay for said property by stock issued to the amount of the value of the property. The stock so issued is full-paid stock; it is not liable to any further call, nor is the owner thereof liable for any further payment. In the absence of actual fraud, the judgment of the directors as to the value of the property so purchased and paid for is conclusive. A stockholder who has sold and delivered his property to a corporation in exchange for its stock is protected from demands for further payments on account of such stock when he shows that his property was accepted by the corporation in payment for his stock at a valuation determined by the board of directors. He forfeits this protection only when actual fraud in the transaction is shown by one who alleges that he has not paid for his stock in money, or money's worth.

The judgment herein is affirmed. We find

No error.

W. W. CHRISTIAN ET AL. v. W. F. CARTER, JR., EXECUTOR, ET AL.

(Filed 13 April, 1927.)

Parent and Child—Wills—After-born Child—Statutes.

The beneficent provisions of C. S., 4169, providing for a child born after the execution of the will of the father, when the father has failed to do so, is not affected by the presumptive knowledge of the father, from the condition of his wife, that at the time he made the will he must have anticipated the birth, but upon the fact that the child was born thereafter.

APPEAL by defendants from *Finley, J.,* at February Term, 1927, of SURRY.

Controversy without action. The substance of the agreed facts is as follows:

1. J. E. Carter and Anne Fulton were married on 4 October, 1922.

2. J. E. Carter died in Surry County on 11 May, 1923, leaving a will, dated 1 February, 1923, in which he devised all his property to his wife, appointing W. F. Carter, Jr., his executor.

3. When the will was made his wife was *enceinte,* but neither he nor she knew her condition, and the child was born on 23 September, 1923.

4. W. F. Carter, Jr., as executor of the estate of the deceased, and Anne Fulton Carter, executed and delivered to the plaintiffs a deed for lots 54 and 55 of Fairview Heights, which were a part of the testator's estate.

Judge Finley was of opinion that the deed is invalid as to the interest of the posthumous child, and that the child is entitled to such part of the estate of her father as she would have been entitled to if he had died intestate. It was so adjudged, and the defendants excepted and appealed. Affirmed.

Carter & Carter for appellants.

ADAMS, J. The will was executed 1 February, 1923; the testator died 11 May, 1923; Anne Hollingsworth Carter, his only child, was born 23 September, 1923. The statute provides that children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate. C. S., 4169. This statute, and the decisions construing it, must control in the disposition of the present appeal. *Sorrell v. Sorrell, ante,* 439; *Nicholson v. Nicholson,* 190 N. C., 122; *Howe v. Hand,* 180 N. C., 103; *Flanner v. Flanner,* 160 N. C., 126. In *Howe's case,* Mrs. Howe devised the land to her husband; the will was executed before the birth of the children;

the husband conveyed the land, and the children recovered it after the purchaser had been in possession for ten years

The appellants do not claim that provision was made for the after-born child, as in *Rawls v. Ins. Co.,* 189 N. C., 368, or that the child was excluded by the terms of the will, as in *Thomason v. Julian,* 133 N. C., 309, but they contend that the statute has no application to the present case because the testator had no knowledge of his wife's condition. To sustain this position, they cite as authority *Flanner v. Flanner, supra,* to the effect that the law was intended to apply only when the omission to provide for an after-born child resulted from inadvertence or mistake; but this, we apprehend, does not necessarily imply the parent's actual knowledge that the child is *in esse.* At common law, the subsequent birth of a child did not work a revocation of the parent's will; but the civil law adopted and applied a different rule, which apparently was based upon the presumed oversight or inadvertence of the parent in providing for an existing or a contingent situation. It has been suggested that the object of the law is to secure the moral influence of having before the mind of the testator a contingent event so momentous as the birth of a child. *Ellis v. Darden,* 11 L. R. A. (Ga.), 51; Annotation, An. Cas., 1913 D, 1318. It is the subsequent birth, not the father's knowledge, which effects the partial revocation. Accordingly, it has been said by the Court, *Chief Justice Ruffin* delivering the opinion: "When it happens that a will is made by a parent who did not contemplate the birth of a child subsequently, and in consequence of that gave away all of his estate to his other children, or to other persons, thereby leaving an after-born child destitute, the law interposes this provision beneficially as supplying that which it presumes the parent must have intended to make and would have made after the birth of the child had not death surprised him, or a mistake as to the effect of his will, or an unaccountable supineness prevented him from making the alteration dictated by natural affection." *Meares v. Meares,* 26 N. C., 192.

The judgment is
Affirmed.

MATTIE H. MOORE v. LAFAYETTE LIFE INSURANCE COMPANY.

(Filed 13 April, 1927.)

Evidence—Nonsuit—Questions for Jury—Insurance, Life — Payment of Premiums.

Where there is a provision in a policy of industrial insurance that the policy would be "in benefit" only upon the payment at a certain time weekly of a specified amount, and there is some evidence from which the

jury may reasonably infer that this condition had been complied with by the insured, the issue should be answered by the jury, and a judgment as of nonsuit upon the evidence in the case is erroneously entered.

APPEAL by plaintiff from *Oglesby, J.,* at September Term, 1926, of FORSYTH.

Civil action to recover on a contract of insurance.

On 25 May, 1925, the defendant, in consideration of weekly premiums of twenty-five cents each, to be paid on every Monday thereafter, issued to James B. Moore a life insurance policy in the amount of $175, payable to plaintiff (wife of the assured) upon the death of the assured, provided said policy was then "in benefit"; that is, provided the premiums were fully paid, or "in arrears not exceeding four weeks," at the time of the death of the assured. Otherwise, the policy, by its own terms, was to be null and void.

The assured died 28 December, 1925. Plaintiff testified that the policy was in the possession of the assured and in benefit at the time of his death. She further offered a receipt for premiums paid by the assured, purporting to bear date "12-17-25" (17 December, 1925). There was other evidence given by the defendant's agent tending to show that the last payment was made on 9 November, 1925.

At the close of plaintiff's evidence, on motion of defendant, judgment was entered as in case of nonsuit. Plaintiff appeals, assigning errors.

Wallace & Wells for plaintiff.
Benbow, Hall & Benbow for defendant.

STACY, C. J., after stating the case: The evidence offered by the plaintiff was sufficient to carry the case to the jury. It is true, the evidence is conflicting as to whether the premiums were or were not in arrears more than four weeks at the time of the assured's death, but this did not warrant the withdrawal of the case from the jury. *Myers v. Kirk,* 192 N. C., 700; *Smith v. Coach Line,* 191 N. C., 589; *Shell v. Roseman,* 155 N. C., 90. If the plaintiff be entitled to recover under any view of the evidence, the motion for judgment as of nonsuit should be overruled. It is when—and only when—the plaintiff is not entitled to recover in any aspect of the case that such motion should be allowed. *Christman v. Hilliard,* 167 N. C., 4.

Reversed.

WALTER E. BROCK ET AL. v. W. B. ELLIS.

(Filed 13 April, 1927.)

Appeal and Error—Certiorari—Motions—Record Proper.

It is uniformly required that the statute must be complied with that the appellant aptly file a record proper in the case appealed from as a prerequisite for the Supreme Court to grant his motion for a *certiorari* to bring up the case for review.

MOTION by plaintiffs to docket and dismiss defendant's appeal under Rule 17. Counter motion by defendant for *certiorari* to have case brought up from FORSYTH Superior Court and heard on appeal.

Manly, Hendren & Womble for plaintiffs.
W. B. Ellis in propria persona.

STACY, C. J. This case was heard at the November Term, 1926, Forsyth Superior Court, and resulted in the affirmance of a judgment in favor of the plaintiffs rendered on a verdict in the Forsyth County Court, from which the defendant had appealed to the Superior Court, as was his right under the law. *Barton v. Barton,* 192 N. C., 453; *Chemical Co. v. Turner,* 190 N. C., 471; *Smith v. Winston-Salem,* 189 N. C., 178.

No notice of appeal to this Court was given by the defendant at the November Term, Forsyth Superior Court, but at the following December Term of said court entries of appeal were permitted to be made by the defendant, and the court, purporting to act in its discretion, "allowed the defendant forty-five days in which to make up and serve case on appeal, and plaintiffs forty-five days thereafter to serve counter-case, or file exceptions." These entries were made in the absence of counsel for plaintiffs and without their consent.

Without deciding whether the entries of appeal, made at the December Term, 1926, Forsyth Superior Court, were of any force or effect, it is sufficient to say that, up to the present time, no statement of case on appeal to this Court has been prepared or served by the defendant as required by the statute, nor has the record proper, or any part thereof, been filed in this Court, without which a motion for *certiorari* may not be entertained. *Baker v. Hare,* 192 N. C., 788; *Murphy v. Electric Co.,* 174 N. C., 782.

Plaintiffs are clearly within their rights, and they are entitled to have the appeal dismissed at the cost of the defendant. *Cox v. Lumber Co.,* 177 N. C., 227. The defendant's motion for *certiorari* must be denied. *Waller v. Dudley, ante,* 354.

Certiorari disallowed. Appeal dismissed.

W. T. CARSTARPHEN v. EZELLE CARSTARPHEN AND JOHN RANDOLPH CARSTARPHEN.

(Filed 13 April, 1927.)

1. **Sales—Execution—Homestead — Excess — Judgments—Evidence — Statutes.**

   Where the controversy in the action is made to depend upon the issue arising from the pleadings and evidence introduced upon the trial between the purchaser at an execution sale and the heir at law of the judgment debtor, as to whether the homestead allotted in the action embraced the home tract of the deceased, or whether it included an adjoining tract of land of the deceased judgment debtor, the original return of the appearance, or copy thereof on file in the proceedings, to lay off the homestead found in the judgment will control, and the further proceedings in the matter are competent evidence, without the necessity of registration. C. S., 731.

2. **Homestead—Allotment Less Than $1000—Irregularity of Appraisement—Statutes.**

   An allotment of a homestead to the value of $800, laid off under execution, does not render the allotment void, especially when the plaintiff in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. C. S., 740.

3. **Instructions—Directing Verdict—Evidence—Excess Over Homestead —Execution—Sales—Burden of Proof.**

   Where the purchaser of land sold under execution contends that he is the owner by virtue thereof of the *locus in quo* in the present action as the surplus after laying off the homestead of the defendant's predecessor in title, the burden of proof is upon him, and a directed verdict in his favor is properly denied in the trial court, and he must depend upon the strength of his own title and not the weakness of that of the defendant in ejectment.

4. **Appeal and Error—Presumptions—Burden of Proof.**

   On appeal to the Supreme Court, the presumption is in favor of the correctness of the trial in the Superior Court, with the burden on appellant to show error.

5. **Same—Prejudicial Error.**

   In order for appellant to be awarded a new trial on appeal to the Supreme Court, it must not only be made to appear that technical error has been committed in the lower court, but that it was of a character so prejudicial to appellant that a different verdict might otherwise reasonably have been rendered. As to whether an estoppel should have been pleaded in this action of ejectment, *quære.*

6. **Instructions—Evidence—Directing Verdict.**

   Where, by every reasonable intendment, the evidence and admissions on the trial should be resolved in appellee's favor, a directed verdict thereon against the defendant is not erroneous.

APPEAL by plaintiff from *Calvert, J.,* and a jury, at November Term, 1926, of NORTHAMPTON. No error.

Facts will be stated in the opinion.

A. C. Gay and McMullan & LeRoy for plaintiff.
Burgwyn & Norfleet and Travis & Travis for defendants.

CLARKSON, J. (1) Captain John R. Carstarphen was first married to Willie E. Carstarphen, and had by this marriage one son, Dr. W. T. Carstarphen, the plaintiff in this action. She died in 1909 intestate. (2) After his first wife's death, he married Ezelle Carstarphen, on 11 November, 1911. By this marriage he had one son, John Randolph Carstarphen, born in 1912. Both his second wife and youngest son, who is a minor defended by guardian *ad litem,* are defendants in this action.

The action is brought by half-brother against a minor half-brother and his father's widow by the second marriage, to recover certain land alleged to have belonged to his mother, Willie E. Carstarphen. Capt. John R. Carstarphen was a man of considerable wealth, but engaged in the mercantile business, and about 1887 became heavily involved in debt. Many judgments were taken against him. At the time he owned real estate consisting of:

(1) Dr. William Carstarphen's (father of John R. Carstarphen) home place—about 570 acres.

(2) The "Bass tract," about 100 acres.

(3) "Sykes Old Store Place," about 250 acres (90 acres conveyed to W. W. Smith, over which there is no dispute).

(4) John R. Carstarphen's "home place."

After the death of Dr. William Carstarphen, the tracts above, one, two and three, which belonged to Dr. William Carstarphen, were acquired by John R. Carstarphen, who died 13 October, 1922, leaving a last will and testament, in which he bequeathed and devised his property to the defendants.

This is an action of ejectment, brought by plaintiff to recover three tracts of land: (1) John R. Carstarphen "home place"—the part in excess of the homestead; (2) the "Bass tract"; (3) the "Sykes Old Store Place." The plaintiff claims title by virtue of sale under sundry executions issued 5 May, 1887, on certain judgments against John R. Carstarphen. At the sale the land was purchased (after the homestead was allotted to John R. Carstarphen on 11 May, 1887) by P. H. Booth. The sale was made and the deeds were dated 1 August, 1887, from M. F. Stancell, sheriff, to P. H. Booth, and P. H. Booth and wife, years afterwards, on 31 March, 1893, and 6 October, 1893, conveyed the land to W. (Willie) E. Carstarphen, wife of John R. Carstarphen, who died intestate in 1909, leaving plaintiff her only son and heir at law.

The issues submitted, first three only material, and the answers thereto, were as follows:

"1. Is the plaintiff the owner and entitled to the possession of the tract of land known as the 'Sykes (Old) Store Place,' described in subsection 3 of section 1 of the complaint? Answer: 'Yes.'

"2. Is the plaintiff the owner of and entitled to the possession of the John R. Carstarphen Home Place, described in subsection 2 of section 1 of the complaint, excepting therefrom the land allotted to the said John R. Carstarphen as a homestead? Answer: 'No.'

"3. Is the plaintiff the owner and entitled to the possession of the Bass tract of land, described in subsection 1 of section 1 of the complaint? Answer: 'No.' "

We consider now the controversy between the parties: Plaintiff introduced two deeds, duly recorded, from M. F. Stancell, sheriff, dated 1 August, 1887, to P. H. Booth, the land described as follows:

First deed—(a) One certain tract of land lying in Northampton County, aforesaid, on which John R. Carstarphen resides, bounded by the lands of W. H. Colins, Miss Julia Hodges, G. G. Daniel, and others, containing 275 acres, excepting therefrom the homestead of said Carstarphen, which was recently set apart to him, consisting of 200 acres of said tract and the dwelling thereon.

(b) Also one other tract in said county known as the "Sykes Old Store Place," bounded by the lands of Martha Moody, J. R. Roberson, and others, containing 250 acres, more or less.

Second deed—(a) One tract of land lying in said county, bounded by the lands of Martha Moody, by the public road, and by the lands of Mrs. Lee and others, containing 100 acres, more or less.

(b) One tract of land lying in said county, bounded by the land of John R. Carstarphen, by the Squire land and others, it being the tract lately owned and occupied as residence of the late Dr. William Carstarphen, containing 500 acres, more or less.

The deeds are in regular and proper form, executed pursuant to sale under execution, properly and regularly made and conducted, and duly recorded.

Two deeds from P. H. Booth and wife to W. (Willie) E. Carstarphen, dated 31 March, 1893, and 6 October, 1893, duly recorded. The identical lands which were conveyed by the sheriff to Booth.

Plaintiff also introduced complaint, answer, case agreed, and judgment in case of P. H. Booth v. John R. Carstarphen and others, instituted 15 August, 1887. Plaintiff showed that W. (Willie) E. Carstarphen was dead and that he was the only heir at law.

Defendants denied all the allegations of plaintiff's complaint, and contended the purchase money was furnished by John R. Carstarphen, under an agreement that W. (Willie) E. Carstarphen should hold the land in trust for him. At the close of the evidence, the court below held that defendants had not introduced sufficient evidence to establish a parol trust, and withdrew the issue from the jury.

As to the Dr. William Carstarphen "home tract," which was conveyed by the sheriff to Booth and from Booth and wife to W. (Willie) E. Carstarphen, mother of plaintiff, containing about 570 acres, Dr. W. T. Carstarphen, the plaintiff, came to an agreement with his father, J. R. Carstarphen, 3 July, 1917 (the land surveyed out 570 acres), he to have 380 acres and his father 190 acres in fee (less two acres sold Pres. Garner), deeds made accordingly. The 570-acre tract is out of the controversy, except so far as it may be evidence on the contentions.

As to the "Sykes Old Store Place" tract, the court below charged the jury as follows: "The plaintiff having introduced a clear record title to the land known as 'Sykes Old Store Place,' and the defendants having offered no evidence in rebuttal thereof, and there being no such evidence, the court charges you that in view of the evidence and upon the whole thereof it would be your duty to answer the first issue 'Yes.' "

The real battle was waged around the second and third issues, concerning the "Bass Tract" and the John R. Carstarphen "home place." The plaintiff prayed for special instructions: "(1) In any view of the evidence, and upon the whole thereof, the court charges you that it is your duty to answer the second issue 'Yes.' " (2) Defendants are estopped—Booth v. Carstarphen and others record shows an estoppel. (3) "If you believe the evidence and find the facts to be as testified to by all the witnesses, then the court charges you to answer the third issue 'Yes.' " These instructions were refused, to which exceptions were taken by plaintiff.

The gist of the controversy on these two issues is one of fact. Plaintiff contends, (1) That he is entitled to all the land in the John R. Carstarphen "home place," that is, the excess over the land allotted as a homestead. (2) The "Bass Tract" of about 100 acres. Defendants contend that John R. Carstarphen's "home place" was about 275 acres, and included the "Bass Tract," and all the land was laid off as the homestead, and there was no excess. That originally these two tracts were separate. When John R. Carstarphen acquired the "Bass Tract" from his father it was adjoining his home place, and the two tracts were treated as one—thrown together and worked together. As evidence of the fact, defendants introduced execution dated 5 May, 1887, in favor of Booth v. John R. Carstarphen and others. M. J. Squire, J. A. Squire, and D. B. Zollicoffer were the appraisers, who were regularly summoned and qualified, and laid off John R. Carstarphen's "homestead," and the levy of the sheriff was on the excess. The homestead appraisers' return recites and describes the land as follows: "We have viewed and appraised the homestead of the said John R. Carstarphen, and the dwellings and buildings thereon, owned and occupied by said John R. Carstarphen as a homestead, to be $800, and that the entire tract, bounded by the lands of Mrs. Susan T. Ellis and Mrs. Jim Brewer on the north, and J. W. Morgan on south, Julia A. Hodges and the land of Dr. William Carstarphen estate on the east, and the old Petersburg County road on the west, said to contain 200 acres, is therefore exempted from sale under execution according to law." This description included all the John R. Carstarphen home place and the "Bass Tract"—an entirety.

That plaintiff and his father, John R. Carstarphen, recital in deed, "have come upon an agreement" in regard to the Dr. William Carstarphen home place, 570 acres, and exchange deeds were made 3 July, 1917. No contention was made by plaintiff that he has any interest in the other lands. Plaintiff knew that although the land was taken in his mother's name, his father paid for it. That after he and his father came to an agreement, his father made a will, on 20 September, 1919, and willed the land now claimed by plaintiff, dealing with it as his own, to defendants, his widow and son.

That the entire tract included the John R. Carstarphen "home tract" and the "Bass Tract," were one and laid off by the appraisers as the homestead, and there was no excess to be sold. That plaintiff claims the "Bass Tract" under sheriff's deed to Booth and from Booth and wife to his mother, W. (Willie) E. Carstarphen, under description as follows: "One tract of land lying in said county, bounded by the lands of Martha Moody, by the public road, and by the lands of Mrs. Lee and others, containing 100 acres, more or less."

On the other hand, defendants contend that the levy under which sale of sheriff to Booth and from Booth and wife to plaintiff's mother, the land was described: "One other tract adjoining Mrs. Martha Moody, Mrs. Lee and others, containing 100 acres," and nothing said about "Bass Tract." This levy does not fit description or cover the "Bass Tract"; therefore, plaintiff has shown no title.

Defendants further contend that the sheriff's deed to Booth and plaintiff's own complaint described the home tract as containing 275 acres, and contend that by actual survey the home tract, including the Bass tract, contained only 246 acres. Without the Bass tract, it would contain only 146 acres. That the Bass tract and what plaintiff called the home tract were all in one body, the cultivated land all forming one field and opening, all cultivated together, without any separation or dividing line. Defendants also contended that the boundaries of the homestead, as set out in the original return of the appraisers, embraced the Bass tract. This return states that the homestead is bounded on the north by the lands of Mrs. Susan Ellis and Mrs. Jim Brewer. Defendant's witnesses testified that these lands bounded the Bass tract on the north, and that without the Bass tract they would not touch the Carstarphen land at all. The return also calls for the lands of Julia A. Hodges as one of the boundaries of the homestead. It was shown that her land bounds the Bass tract on one side for its entire length.

The plaintiff introduced evidence in contradiction of this, so that the controversy as to the Bass tract resolved itself into a question of fact as to whether the description relied on by plaintiff did or did not cover the Bass tract. The jury found that it did not. The question as to the John R. Carstarphen home tract the jury found against plaintiff. The second and third issues, found in favor of defendants, determined the fact that plaintiff failed to make out title to the John R. Carstarphen home place, or any part of same, and the homestead, as allotted by the appraisers, was the entire John R. Carstarphen home place—no excess, and the Bass tract included.

There were numerous facts and circumstances to support the contentions of the respective parties. Should the verdict be disturbed? We think not.

The *first legal* position taken by plaintiff: "Was the paper-writing purporting to be a 'homestead appraisers' return' properly admitted in evidence, and the question of its validity properly submitted to the jury?"

Plaintiff contends: (1) That it had not been registered; (2) that it was not found in the judgment roll; (3) that it was not in fact the return of the appraisers.

Dr. D. B. Zollicoffer, the only one of the appraisers now living, testified that it was the return of the appraisers, and it contained the return of the sheriff showing that he summoned and qualified the three appraisers, who signed it on 11 May, 1887, and that on the same day he levied on the excess. It was found in the file of "Executions" in the office of the clerk of the Superior Court, filed with the executions under which it was allotted. These execution also contained the sheriff's return to the effect that he had summoned these men to lay off the homestead, and that they had allotted it on 11 May, 1887, and that on said day he had levied on all lands in excess. Also contained his return of the sales.

R. M. Beale, deputy clerk, testified: "These original papers, executions and return were found in the *proper files.* I marked the homestead return with my initials, so that I could identify it; this is the return."

C. S., 731, in reference to *duty of appraisers; proceeding on return,* latter part of said section, is as follows: "In all judicial proceedings the original return, or a certified copy, may be read in evidence."

Return need not be registered in county where homestead situated if it is filed in the judgment roll of the action. The filing of the return in the judgment roll is constructive notice. *Bevan v. Ellis,* 121 N. C., p. 224. Registration of allotment is not necessary, except when made on petition of homesteader. *Crouch v. Crouch,* 160 N. C., p. 447.

We think the evidence was competent—its probative force was for the jury.

Plaintiff contends the homestead allotment was invalid, being for $800, instead of $1,000. The irregularity, we do not think, makes the allotment void; if there was any question, the judgment in the action of Booth v. Carstarphen and others, record introduced by plaintiff, cured any irregularity. C. S., 740—procedure as to exception to valuation and allotment.

As to the *second* contention of plaintiff: "Was the court below correct in those certain portions of its charge, duly excepted to, relating to said return, to the burden of proof, and the general effect of the testimony, particularly the record in Booth v. Carstarphen?" And the *third* contention: "Was the plaintiff entitled to a directed verdict upon the second and third issues?"

From a careful review of the charge of the court below, we think these contentions cannot be sustained, and that plaintiff on the second and third issues was not entitled to a directed verdict. *See defendants' appeal.* The burden was on the plaintiff. It was an issue of fact for the jury to determine, not the court.

The entire controversy, as to the second and third issue, is practically one of fact, and the probative force for the jury. The court below charged the jury: "The burden of proof is upon the plaintiff to satisfy the jury by the greater weight of the evidence that he is the owner and entitled to the possession of the John R. Carstarphen home place, excepting therefrom the homestead allotment, and upon the plaintiff to satisfy the jury by the greater weight of the evidence that he is the owner and entitled to the possession of the Bass tract." The allegation of plaintiff was that he was the owner, "excepting therefrom the homestead of John R. Carstarphen, deceased, consisting of the dwelling-house and .... acres." This was denied by defendants.

It is well settled that in an action of ejectment a party must recover upon the strength of his own title and not the weakness of his adversary. *Brock v. Wells,* 165 N. C., 170.

In *Moore v. Miller,* 179 N. C., 396, the various methods of showing title by which the requirements can be met are specifically set forth.

The presumption on appeal to this Court is that there is no error committed in the trial in the court below. The appellant must show error, and then a new trial is granted only where the error is material and prejudicial, amounting to a denial of substantial justice. Appellant must show prejudicial and reversible error. A sound public policy looks to the speedy ending of litigation. Courts never encourage litigation, but look with favor on adjustment of differences, and this is especially true in family disputes. In the present case, it is an elder brother against a minor brother, who is defended by guardian *ad litem.* The jury has settled the disputed facts in law we can find in plaintiff's appeal

No error.

DEFENDANTS' APPEAL.

APPEAL by defendants from *Calvert, J.,* and a jury, at November Term, 1926, of NORTHAMPTON. No error.

We have considered plaintiff's appeal in this action, and now come to defendants'.

The question presented by defendants: "This was an action in ejectment, and involves the question whether, under the evidence, his Honor could properly direct a verdict for the plaintiff, on whom the burden of proof rested."

The first issue, material only to be considered, and the answer thereto is as follows: "Is the plaintiff the owner and entitled to the possession of the tract of land known as the 'Sykes Old Store Place,' described in subsection 3 of section 1 of the complaint? Answer: 'Yes.' "

On this issue the court charged: "The court charges you that in view of the evidence, and upon the whole thereof, it would be your duty to answer the first issue 'Yes'; that is, that the plaintiff is the owner and entitled to the possession of the tract of land known as 'Sykes Old Store Place,' described in subsection 3 of section 1 of the complaint."

Defendants contend that plaintiff introduced, over the objection of defendants, the record in the case of P. H. Booth v. John R. Carstarphen and others, in order to show an estoppel against defendants. That this was incompetent, as no estoppel was pleaded. In *Upton v. Ferebee,* 178 N. C., p. 196, *Allen, J.,* says: " 'An estoppel which "shutteth a man's mouth to speak the truth" should be pleaded with certainty and particularity. 8 Enc. Pl. and Pr., 11. The court should be able to see from the pleadings what facts are relied upon to work the estoppel.' (*Porter v. Armstrong,* 134 N. C., 455.) And this case does not come within the exception to the rule, holding that it is not necessary to plead an estoppel when it is apparent on the face of the record, or when the pleadings are general, as in ejectment or trespass, and the party has had no opportunity to enter the plea (*Wilkins v. Suttle,* 114 N. C., 556); *Weeks v. McPhail,* 129 N. C., 73, because in his answer the defendant alleges the tenancy and his claim as landlord, thus affording the opportunity to meet these allegations by pleading the facts relied on to create the estoppel."

In *Fleming v. Sexton,* 172 N. C., at p. 253, the same judge says: "It has been held, under certain conditions, that evidence of an estoppel may be offered by the defendant without pleading it (*Weeks v. McPhail,* 129 N. C., 73), and that it is competent, under a general denial, to show that any deed in the chain of title of the plaintiff is void because made contrary to statute, or by a grantor mentally incapable, or for fraud in the factum. *Mobley v. Griffin,* 104 N. C., 116; *Averitt v. Elliott,* 109 N. C., 564."

Conceding, but not deciding, that the estoppel, the action being for ejectment, should have been pleaded, the burden being on plaintiff, was error, yet we cannot on the entire record hold it as reversible error. All the evidence on the entire record was one way in regard to the "Sykes Old Store Place." Defendants introduced in evidence a description of the lands of J. R. Carstarphen levied upon by the sheriff, and which were sold in excess of the homestead. Among the tracts is the *"Sykes Old Store Place," 250 acres.* This tract was bought at the sheriff's sale by Booth and deeded by Booth and wife to W. (Willie) E. Carstarphen, mother of plaintiff.

In *Booth v. Hairston, ante,* 281, it was held: "Our system of appeals is founded on public policy and appellate courts will not encourage litigation by granting a new trial, which could not benefit the litigant and the result changed upon a new trial, and the nongranting was not prejudicial to his rights. *Bateman v. Lumber Co.,* 154 N. C., 253; *Rierson v. Iron Co.,* 184 N. C., 363; *Davis v. Storage Co.,* 186 N. C., 676. 'They will only interfere, therefore, where there is a prospect of ultimate benefit.' *Cauble v. Express Co.,* 182 N. C., p. 451."

The next vice in the charge complained of by the defendants is that the verdict is a directed one, and this cannot be done when the burden of proof was on plaintiff; it was an issue of fact for the jury, and not for the court to determine, citing *Cox v. R. R.,* 123 N. C., 611; *Bank v. School Committee,* 121 N. C., 109. Conceding this contention is correct, *yet the defendants' evidence,* by every reasonable interpretation, and that unobjected to introduced on the part of plaintiff, all show that the title to the "Sykes Old Store Place" was in plaintiff. See *Trust Co. v. Trust Co.,* 190 N. C., p. 468.

We find in defendants' appeal

No error.

W. W. MICHAUX, ADMINISTRATOR OF BERNARD P. VADEN, JR., v. CITY OF ROCKY MOUNT.

(Filed 13 April, 1927.)

1. **Municipal Corporations—Cities and Towns—Negligence—Streets and Sidewalks—Defects—Supervision and Inspection—Damages.**

Cities are held to the requirement of reasonably safeguarding their streets by proper signals or warnings of dangerous places therein, including defective bridges, and are liable in damages when they have had sufficient knowledge or implied notice in the exercise of reasonable supervision and inspection in which to have made the necessary repairs.

2. **Same—Highway Commission—Negligence—Damages —Interpretation of Statutes.**

Where, under legislative authority, a city has extended its limits so as to include the part of a public highway entering therein, and by its acts has accepted the highway, it thereby becomes responsible for its upkeep as a part of its streets, under the principle requiring it to keep it in a reasonably safe condition, and another statute giving its maintenance to a highway commission, drawing on separate funds for its cost, will not be construed to be in conflict therewith, when such interpretation is in accord with the intent of the statute under proper construction; or to relieve the city from the consequence of its negligence in failing to safeguard a dangerous place, or open space in a bridge thereon, which proximately causes the injury in suit.

APPEAL by defendant from *Barnhill, J.,* at November Term, 1926, of EDGECOMBE. No error.

Civil action to recover damages for the death of the plaintiff's intestate. The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. Judgment on the verdict. Appeal by defendant on exceptions appearing of record. The material facts are stated in the opinion.

Spruill & Spruill and Ramsey & Kerr for plaintiff.

L. V. Bassett, B. H. Thomas, T. T. Thorne, Gilliam & Bond, and Thorp & Thorp for defendant.

ADAMS, J. In 1907 the General Assembly amended the charter of the city of Rocky Mount, investing it with all the property, rights, franchises, and powers of the town of Rocky Mount, and conferring all other powers, rights, and privileges requisite or pertaining to municipal corporations. Private Laws 1907, ch. 209. There is a public highway which extends from Wilson to a place in the city of Rocky Mount, where the Cokey road crosses the Norfolk and Carolina Railroad; and in 1913 the boundaries of the city were extended so as to include, with other territory, that part of the Wilson road lying between the railroad and a prong of Tyancokey Swamp. Private Laws 1913, ch. 208. It is admitted that this is one of the principal public roads leading into Rocky Mount, and that the part of it between the railroad and the bridge where the intestate's death occurred is within the corporate limits of the city, the corporate line extending to the middle of the stream.

Owing to a heavy rainfall, the bridge, which was a concrete structure, gave way and fell into the water on Monday morning, 29 September, 1924, leaving above the water an open space of thirty feet. Two days afterwards, about 8 o'clock in the evening, while it was misty and dark, J. R. Houck and the deceased started from Rocky Mount to Wilson in a Ford coupe. The deceased was at the wheel. Apprehending no danger, he drove upon the bridge and into the open space; the car went into the water, upside down, and "filled up like a bucket." Houck escaped; the deceased was drowned. The city had erected no barrier, had displayed no light, had given no warning of the defect in the bridge. The plaintiff alleged, and by its verdict the jury said that the intestate's death was caused by the city's negligence. The specific allegations of negligence relate to the defective bridge and the failure to repair it, or to inspect it, or to warn the public of the danger.

The duty imposed upon a municipal corporation with respect to thoroughfares within its corporate limits has been prescribed by a number of our decisions, and the principles upon which it rests have been plainly stated. The governing authorities are charged with the duty of exercising due care to keep the streets, sidewalks, drains, and bridges in a reasonably safe condition, and this includes the exercise of due care as to inspection and continuing supervision. If in a street there is a pit, ditch, excavation, or other defect which menaces danger to the public, the authorities must exercise ordinary care in guarding the place by means of barriers, or lights, or such other instrumentality as may be reasonably sufficient for this purpose. They are not insurers, of course; they do not warrant the safe condition of the streets; but they are held to the responsibility of exercising proper care to keep and maintain them in a reasonably safe condition. A breach of duty occurs if with actual or constructive knowledge of the peril they fail to exercise the degree of care imposed upon them by the law. *Fitzgerald v. Concord,* 140 N. C., 110; *Bailey v. Winston,* 157 N. C., 253; *Smith v. Winston,* 162 N. C., 50; *Foster v. Tryon,* 169 N. C., 182; *Sehorn v. Charlotte,* 171 N. C., 540; *Dowell v. Raleigh,* 173 N. C., 197; *Bailey v. Asheville,* 180 N. C., 645; *Tinsley v. Winston,* 192 N. C., 597. See Annotation to *Elam v. Mt. Sterling,* 20 L. R. A. (N. S.), 518.

The defendant, we understand, without impeaching the soundness of these principles, takes the position that they are not applicable to the present case for the reasons now to be given. In 1907 the Legislature established the Rocky Mount Road District in the counties of Nash and Edgecombe. Public Laws 1907, ch. 814. The district embraces several hundred square miles. The road commission was given supervision and control of the convict force and supervision of all public roads in the district. The road tax was set aside as a special fund to be used in the construction, improvement, and maintenance of the public roads in the district and bridges that were not to cost more than fifty dollars. In section 18 it is provided: "No money shall be expended by the said road commission on any street of any incorporated town or city within said road district: *Provided, however,* that this section shall not apply to that portion of any main road or thoroughfare directly leading from or into Rocky Mount one-half mile and more from the center of said town or city of Rocky Mount, and for the purpose of this act the middle of the main track of the Atlantic Coast Line Railroad directly in front of the middle of the passenger station is declared to be the center of Rocky Mount."

There is evidence tending to show that upon the passage of this act the road commission took control of the part of the Wilson road which lies between the run of Tyancokey Swamp and the Cokey road, and exercised control over it continuously thereafter until the day of the alleged injury and death; and that when the concrete bridge was built, the road crossing the swamp was changed and reopened about twenty feet west of the place occupied by the old road, the part recently constructed extending about one hundred and seventy-five yards. The defendant contends that the road commission had exclusive control of the road; that there was no causal connection between the city's failure to keep the road in repair and the death of the intestate; and that liability attaches only when the duty to repair and to safeguard the public resides in a single governmental agency. These contentions present the specific question whether the act creating the road commission relieves the city, having actual or constructive notice of the danger, of the obligation to give notice of the peril.

We should be reluctant to accede to the proposition that the duty of inspection and maintenance devolved exclusively upon the road commission. Perhaps it was thus imposed before the corporate limits of the city were extended, but after the parts of the road in question was taken into the city limits, was there no change in the situation? "A public highway *in rure,* upon its inclusion by incorporation or annexation, within the municipal boundaries, becomes *ipso facto* a street, and subject to municipal control." 28 Cyc., 837. In *Moore v. Meroney,* 154 N. C., 158, it is said: "When a public highway enters an incorporated town, or such town builds up on one already existent, it usually follows that the highway, or so much of it as is within the corporate limits, comes under the regulation and control of the corporate authorities as a part of the public streets. Elliott on Streets and Roads, secs. 415 and 416. In the absence of constitutional restraint, these authorities may have power to vacate or discontinue a street or public way, but when such street has been once established they can only do so by legislative sanction expressly given or necessarily implied from powers which are so conferred, and then compensation must be made to abutting owners whose property is injured. *Moose v. Carson,* 104 N. C., 431; *Chair Co. v. Henderson,* 121 Ga., 399." And in *Gunter v. Sanford,* 186 N. C., 452: "When a new governmental instrumentality is established, such as a municipal corporation, it takes control of the territory and affairs over which it is given authority to the exclusion of other local governmental instrumentalities. The fact that a highway extends through the corporate limits of a town or city does not deprive the municipality of its exclusive control over the streets or relieve it of the duty of improving and keeping them in repair. 'The object of incorporating a town or city is to invest the inhabitants of the locality with the government of all matters that are of special municipal concern, and certainly the streets are as much of special and local concern as anything connected with a town or city can well be. It ought, therefore, to be presumed that they pass under the exclusive control of the muncipality as soon as it comes into existence under the law.' 1 Elliott on Roads and Streets, sec. 505; 2 Cooley on Taxation, 1251." See, also, *Gastonia v. Cloninger,* 187 N. C., 765.

It is true that the municipality takes the land and corporate responsibility therefor in the condition in which it existed at the date of inclusion (28 Cyc., *supra*), but there is reason to doubt whether the general rule we have given is affected by the act establishing the road commission. The case of *Waynesville v. Satterthwait,* 136 N. C., 226, seems to be authority against the defendant's position. There the board of aldermen of Waynesville were empowered by special act to lay off, widen and straighten new streets in the town when in their opinion the public interest required the exercise of such power. By the provisions of another act the commissioners of Haywood County were authorized, when the proposition was approved, to issue and sell bonds of Waynesville Township for the purpose of macadamizing, grading and improving the public roads, etc. The road commissioners were given absolute control and management of the public roads of the township and were empowered to expend the funds arising from the sale of bonds for the purpose indicated. This act provided that it should be the duty of the road commissioners to begin improvements at the courthouse on the four main roads in said township. Referring to the apparent conflict of authority between the road commissioners and the governing authorities of the town, the Court, after remarking that it was not necessary to express an opinion upon the right of the Legislature to confer upon a board of commissioners or other agency composed of persons not required to be residents of the town, the power to enter its corporate limits and relocate or open streets therein, said: "Any divided control or authority in regard to them must necessarily result in conflict and confusion. The courts will always endeavor to ascertain the intention of the Legislature by a careful examination of the statute and its several parts, taking into consideration the purpose and scope of the legislation, the present status of the subject-matter, and the rights and interest affected. They will also endeavor to so construe the act that no conflict with existing statutes occur further than is expressly or by necessary implication made necessary. The courts will never bring into question the power of the Legislature until they find no other reasonable way of deciding the question presented. *Mardre v. Felton,* 61 N. C., 279. The question presented by this record to be first considered is whether the Legislature has by the Act of 1903 conferred upon the defendant commissioners the 'absolute control' of any of the streets in the town of Waynesville. If such is the effect of the statute, it must, in respect to such streets, repeal by implication section 16 of the charter. Certainly the board of aldermen and the defendant commissioners cannot at the same time have and exercise 'absolute control' of the same street." The conclusion was that the words "shall begin improvements at the courthouse on the four main roads in said township," could be given effect by requiring the road commissioners to begin their work at the boundary of the corporation leading to the courthouse, thus leaving the city of Waynesville in the exclusive control of its streets.

We do not deem it necessary, however, definitely to decide this question or to say whether the repugnant section of the act establishing the road district was abrogated by the repealing clause of the act amending the charter of the city. If it be granted that after the road was taken into the corporate limits the road commission still had power to keep it up, this would not in itself absolve the city from liability for its negligence. Dual liability, joint or primary and secondary, has frequently been approved and enforced. *Brown v. Louisburg,* 126 N. C., 701; *Kinsey v. Kinston,* 145 N. C., 106; *Seagraves v. Winston,* 170 N. C., 618; *Hardy v. Construction Co.,* 174 N. C., 320. The city recognized the road as a public thoroughfare, laid mains in it, put signs on it, and evidently held it out to the public as one of its streets. This was at least evidence of acceptance. 18 C. J., 84 (82). That the old road was changed at the swamp when the concrete bridge was built is immaterial. The authorities of the city had not only constructive, but actual notice of the fallen bridge in ample time to give due warning to people having occasion to cross the stream. The superintendent of the street department "saw a man go into the hole in the day time, and did not do anything to barricade it." Even if the roads were to be maintained by taxes levied in the district and disbursed by the road commission the public safety nevertheless demanded that the governing authorities of the city should exercise due care to give timely warning of the great danger to which travelers were exposed. *Willis v. New Bern,* 191 N. C., 507. In this, as shown by the verdict, the city failed and should not now be permitted to escape liability for its negligence. What we have said disposes of all the exceptions, including those to the refusal to grant judgment of nonsuit and to the instructions given the jury. We have given to the cases cited from other jurisdictions the consideration which the importance of the appeal demands, but we have discovered no convincing reason for departing from the principles announced and adhered to in our own decisions. We find

No error.

MARY HATCH HARRISON ET AL. v. THE CITY OF NEW BERN ET AL.

(Filed 13 April, 1927.)

1. **Trial by Jury—Agreement by Parties—Waiver — Evidence — Appeal and Error—Constitutional Law.**

   Where the parties to an action agree that the trial judge find the facts, they thereby waive a trial by jury, and the facts so found by him upon supporting evidence are conclusive on appeal.

2. **Municipal Corporations—Cities and Towns—Cemeteries—Deeds and Conveyances—Statutes—Equity—Injunction.**

   Where the proper authorities of a city have purchased lands for a Negro cemetery in excess of the fifty acres allowed by C. S., 2623, in good faith, to meet a necessary need therefor, and at a reasonable price, and have paid therefor and accepted a deed from the owners, injunctive relief at the suit of the taxpayers will be denied.

3. **Same—Suits—Taxpayers—Excess of Lands for Cemetery Purposes—Procedure.**

   Where the proper authorities of a city have, in good faith and at a fair price, purchased an acreage of lands in excess of that allowed by C. S., 2623, have paid the purchase price and received the deed, in a suit to enjoin the transaction brought by the taxpayers: *Held,* the relief sought to declare the transaction void and to place the parties *in statu quo* will be denied, and a judgment requiring the city, within a stated time, either to sell the excess or to use it for proper city purposes, etc., retaining the cause for further orders, is proper.

4. Municipal Corporations—Cities and Towns—Statutes—Budget—Cemeteries—Actions—Injunction—Taxpayers.

The failure of the board of aldermen of a city to make provision in their budget for moneys for the purchase of a city cemetery gives the taxpayers no right to injunctive relief after the transaction has been closed, the remedy being by direct action by the State as to the right of the municipality to hold the title thus vested in it.

APPEAL by plaintiff from *Sinclair, J.*, at October Term, 1926, of CRAVEN. Affirmed.

On 6 March, 1926, the defendant, the city of New Bern, purchased of defendants, L. H. Cannon and R. L. Stallings, two tracts of land, located about three miles from the corporate limits of said city, containing in all about 93 acres, paying therefor the sum of $13,500. These tracts of land were conveyed to said city by deeds of L. H. Cannon and wife, and R. L. Stallings and wife, which were duly recorded on 8 March, 1926.

In this action, begun on 28 April, 1926, plaintiffs allege that said tracts of land were purchased by said city to be used as a cemetery for the burial of persons of the negro race; that such use of said tracts of land will injuriously affect the value of other lands adjacent to said tracts in which plaintiffs are interested, and that by reason of their location at a distance of three miles from the city, the said lands are not suitable for a cemetery in which to bury negroes who die in said city.

Upon these allegations plaintiffs pray judgment that the city of New Bern, its mayor and board of aldermen be restrained and enjoined perpetually from using said tracts of land as a cemetery for the burial of persons of the negro race.

Plaintiffs further allege that the purchase of said tracts of land, containing in all 93 acres, was unlawful for that (1) the city of New Bern is without authority to purchase and hold more than 50 acres of land, whether within or without its corporate limits, for the purpose of a cemetery (C. S., 2623, sub-sec. 3); (2) no provision was made in the budget of said city for the fiscal year, including the month of March, 1926, for an appropriation for the purchase of said tracts of land (C. S., 2922 *et seq.*); and (3) the purchase of said tracts of land was a fraud upon the said city, in which its mayor, the chairman of the committee on cemeteries of its board of aldermen, and the defendants, L. H. Cannon and R. L. Stallings, participated.

Upon these allegations plaintiffs pray judgment that said purchase be declared unlawful and void, and that defendants, L. H. Cannon and R. L. Stallings, be required to pay back to the city of New Bern the sums of money paid to them, respectively, as the purchase price for said tracts of land, and that the said city be required to reconvey said tracts of land to said L. H. Cannon and R. L. Stallings, or that their deeds to the city be declared void and ordered canceled.

A trial by jury was duly waived by the parties hereto, and it was agreed that the judge should find the facts from the affidavits filed and the testimony of witnesses, and render judgment thereon.

From the judgment upon the facts found by the judge, plaintiffs appealed to the Supreme Court.

Ward & Ward and Whitehurst & Barden for plaintiffs.
Moore & Dunn for the City of New Bern.
Ernest M. Green for defendant, L. H. Cannon.
Guion & Guion for defendant, R. L. Stallings.

CONNOR, J. Plaintiffs filed twenty-eight exceptions to the findings of fact made by *Sinclair, J.*, and to his judgment rendered thereon. Fifteen of these exceptions are that his Honor failed to find the facts set out in each of said exceptions; six of the exceptions are that his Honor found the facts as set out therein. Neither of these exceptions can be sustained.

There was evidence to support each of the findings of fact as made by his Honor. Where the parties waive a trial by jury and agree that the judge may hear the evidence, and find the facts therefrom, a finding of fact by the judge is as conclusive, when there is evidence to support such finding, as a finding of fact by a referee or by a jury. In *Buchanan v. Clark*, 164 N. C., 56, *Walker, J.*, says: "Parties can have their causes tried by a jury, by reference, or by the court. They may waive the right of trial by jury by consenting that the judge may try the case without a jury, in which event he finds the facts and declares the law arising thereon. His findings of fact are conclusive, unless proper exception is made in apt time, and there is no evidence to support his findings or any one or more of them." This principle is well settled.

The facts set out in plaintiffs' exceptions, and which they contend the judge should have found from the evidence, were either admitted in the pleadings, controverted by the defendants, or immaterial. As to those controverted by defendants, there was a conflict in the evidence, and the judge's failure to find the facts to be as contended by plaintiffs cannot be held as error. The plaintiffs had agreed that the judge should hear the evidence and find the facts. The judge by reason of such agreement passed upon both the credibility of the evidence and its weight, in determining the facts upon which he should render judgment.

The facts which are determinative of the rights of the parties to this action, as found by the judge, and upon which he rendered the judgment to which plaintiffs excepted, are as follows:

1. "That the city of New Bern is a thriving, growing town, with a large colored population."

2. "That there is and was an actual, instant and imperative need of lands for a cemetery for the burial of the colored dead of the city of New Bern."

3. "That said lands were the only available and suitable lands for such purposes and are as conveniently situated as the said city could reasonably obtain."

4. "That the use of said lands for cemetery purposes need not be a nuisance, and at the time of bringing this action, and of the hearing, no objectionable use has been made of said lands by the city."

Upon the foregoing facts, there is no error in the judgment dissolving the temporary restraining order theretofore issued in this action and refusing to restrain and enjoin the city of New Bern, its mayor and board of aldermen from using not exceeding fifty acres of said land for cemetery purposes.

In further support of the judgment the judge found facts as follows:

1. "That no provision was made in the budget for the payment of the purchase price for said lands, but the acquisition of lands for use as a cemetery was immediately necessary, and the city officials were justified in acting upon such an emergency."

2. "That in such an emergency the city officers acted for the best interests of the city in purchasing the lands described in the complaint."

3. "That the price paid by the city for said lands is reasonable and in keeping with the price of adjacent and adjoining lands."

4. "That there was no moral turpitude or fraud on the part of any of the defendants or of any of the city officials of the city of New Bern."

5. "That the purchase of the land as set forth in the complaint is no longer an executory contract, but is an executed contract, fully completed, and the whole purchase money paid."

Upon the foregoing facts, "it was ordered, adjudged and decreed that the defendant, the city of New Bern, is seized in fee simple of the lands described in the complaint, and that the said city be and it is now authorized and empowered to select so much as fifty acres of said land to be used by it for cemetery purposes; that the defendant, the city of New Bern, be and it is hereby authorized now to elect either to appropriate and use the residue of the lands for city purposes other than cemetery purposes, or to sell the same at public or private sale at a price and on terms to be submitted to and approved by this court.

This cause is retained to the end hereinabove provided, and in the event the city elects to retain the residue of the property after allotment of so much as not more than fifty acres thereof for cemetery purposes, such election shall, within the period of sixty days, be duly certified in this cause; and in the event the city elects to sell the residue of said property, it shall within a period of sixty days from the date hereof proceed to obtain bids, either at public or private sale, and submit same to this court.

This cause is retained, and the plaintiffs are adjudged to pay the cost."

The judge having found that there was no fraud in the transaction, which resulted in the purchase by the city of the lands described in the complaint, and in the conveyance of said lands to the city by deeds duly recorded, either on the part of the officials who acted therein for the city, or on the part of defendants, who sold and conveyed the same to the city, and that said transaction was completed prior to the commencement of this action, there is no error in the judgment denying the plaintiffs the relief which they seek in this action against defendants, L. H. Cannon and R. L. Stallings. Although its acts in purchasing said lands and paying therefor were *ultra vires,* the city of New Bern, upon the facts found by the judge, could not maintain an action to rescind or set aside the transaction. The principle is stated, with many authorities to sustain the statement, in 14a, C. J., 319, as follows:

"The general rule is that *ultra vires* transactions are recognized as unassailable, and are permitted to stand as the foundation of rights acquired under them, after they have been fully performed. . . . A frequently repeated judicial doctrine is that executed dealings of a corporation must be allowed to stand for and against both parties where the plainest rules of good faith require it."

Plaintiffs as taxpayers and residents of the city are not entitled to relief as against these defendants, which would be denied to the city.

Although the purchase of the lands for the purpose of a cemetery, and the payment of the purchase price therefor by the city were *ultra vires,* for that said lands contained more than fifty acres (C. S., 2623, subsec. 3), and no provision had been made in the city's budget for an appropriation for the payment therefor (C. S., 2922 *et seq.,* and C. S., 2960), it does not follow that plaintiffs, as taxpayers and residents of the city, are entiled to the relief sought in this action against the city of New Bern. The principle applicable to the facts is stated in 28 Cyc., 632, as follows:

"Where a municipal corporation, having power under its charter to acquire and hold real estate for some purposes, takes a conveyance of property for an unauthorized purpose, although the transaction is *ultra* *vires,* the deed is not void, but vests title in the corporation, and its power to hold the property can be question only by the State in a direct proceeding for that purpose."

Upon all the facts found by the judge we find no error in the judgment.

By its terms the city will hold and use, as it is authorized by statute to do, not exceeding fifty acres of land purchased by it for the purpose of a cemetery.

While the board of aldermen has made an appropriation of money for which no provision was made in the budget, and has paid same out of the city's treasury, in violation of the statute, the city has received full value for said money. This money was paid by the city to defendants, L. H. Cannon and R. L. Stallings, who received the same in good faith, prior to the commencement of this action. The plaintiffs, as taxpayers, are not entitled to judgment requiring these defendants to return the money to the city. The judgment is

Affirmed.

L. H. CALDWELL v. A. C. BLOUNT ET AL.

(Filed 13 April, 1927.)

1. **Deeds and Conveyances—Husband and Wife—Wife's Deed to Husband —Statutes.**

   The validity of a deed to lands made by the wife to her husband rests solely by statute, which is to remove the common-law irrebuttable presumption that such was for the husband's benefit, and in order to effectuate the intent of the statute, the conclusion by special probate of the officer must state that the conveyance to her husband of the wife's separate lands was not unreasonable, as well as injurious to her. C. S., 2515.

2. **Same—Interpretation of Statutes—Derogation of Common-Law Right.**

   The statute permitting a conveyance of her separate lands by the wife to the husband must be strictly construed, being in derogation of her common-law right, as to whether its terms are substantially complied with. C. S., 2515.

3. **Same—Estates—Curtesy.**

   Where the husband has had children by the wife of his first marriage, and he has received an invalid deed from her of her separate lands, after her death he has only an estate for life therein as tenant by the curtesy, and under foreclosure sale under a mortgage given by himself and his second wife, only such life estate may be conveyed to the purchaser. C. S., 2515.

STACY, C. J., dissenting.

APPEAL by defendants from *Midyette, J.*, at December Term, 1926, of ROBESON. Modified and affirmed.

Action to foreclose deed of trust executed by A. C. Blount and his wife, Julia Blount, to secure payment of their note to plaintiff.

The validity of a deed executed by Sabriana Blount conveying the land described therein to her husband, A. C. Blount, is the only matter in controversy between the parties to this action.

The court was of opinion that said deed is valid and that by virtue thereof A. C. Blount was seized in fee of the land conveyed therein at the time he and his second wife, Julia Blount, executed the deed of trust by which they conveyed the said land to the trustee to secure the payment of their note to the plaintiff.

From the judgment upon the facts agreed defendants appealed to the Supreme Court.

Dickson McLean, H. E. Stacy and Carl W. Pridgen, Jr., for plaintiff.

W. Y. Floyd, Johnson & Johnson and John Blount McLeod for defendants.

CONNOR, J. On 20 December, 1911, Sabriana Blount, the first wife of A. C. Blount, executed a deed sufficient in form to convey the land described therein to her said husband in fee. This deed, together with the certificate of the justice of the peace before whom its execution was acknowledged, and by whom the private examination of Sabriana Blount was taken, was thereafter duly recorded.

At the death of Sabriana Blount she left surviving her husband, A. C. Blount and their four children. These children, as heirs at law of Sabriana Blount, are defendants in this action. On 16 September, 1922, A. C. Blount and his second wife, Julia Blount, conveyed the land described in the deed from Sabriana Blount to A. C. Blount to Dickson McLean, trustee, to secure the payment of their note to the plaintiff. This note is now due and unpaid. Plaintiff has brought this action for the foreclosure of said deed of trust and for the sale of said land by a commissioner to be appointed by the court for that purpose.

The question presented is whether the trustee in the deed of trust has an estate in fee in the land conveyed to him, or only an estate therein for the life of A. C. Blount. If the deed from Sabriana Blount to her husband, A. C. Blount, is valid as a conveyance of the land described therein, the trustee has an estate in fee in said land; if the deed is not valid, he has only an estate for the life of A. C. Blount. It is conceded that the deed is valid, if the certificate of the justice of the peace is in compliance with C. S., 2515.

This certificate is as follows:

"State of North Carolina—Robeson County.

"I, N. C. Graham, a J. P., do hereby certify that Sabrina Blount and A. C. Blount, his wife, personally appeared before me this day and acknowledged the due execution of the annexed deed of conveyance, and the said Sabrina Blount, being by me privately examined, separate and apart from her said husband, touching her voluntary execution thereof, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband, or any other person, and that she doth still voluntarily assent thereto.

"This is to certify that this deed is not ingerious to the said Sabrina Blount.

"Witness my hand and seal this 20th day of December, 1911.

"N. C. GRAHAM, (Seal)
"Justice of the Peace."

Conceding that upon his private examination of Sabriana Blount the justice of the peace found, as stated in his certificate that the deed was not injurious to her, is the certificate defective for that he does not also state therein his conclusion that the deed was not unreasonable?

In order that the deed of a wife, conveying land to her husband, shall be valid, the statute requires that upon the examination of the wife, separate and apart from her husband, as required by law in the probate of deeds of *femes covert,* it shall appear to the satisfaction of such officer that the wife freely executed such deed and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be. C. S., 2515.

It has been uniformly held by this Court that the deed of a wife, conveying land described therein to her husband, is void, unless there is attached or annexed to said deed the certificate of the probate officer as required by statute. See *Crocker v. Vann,* 192 N. C., 422; *Garner v. Horner,* 191 N. C., 539; *Best v. Utley,* 189 N. C., 356; *Whitten v. Peace,* 188 N. C., 298; *Davis v. Bass,* 188 N. C., 200; *Smith v. Beaver,* 183 N. C., 497; *Foster v. Williams,* 182 N. C., 632; *Wallin v. Rice,* 170 N. C., 417; *Butler v. Butler,* 169 N. C., 584; *Singleton v. Cherry,* 168 N. C., 402; *Kearney v. Vann,* 154 N. C., 312; *Sims v. Ray,* 96 N. C., 87.

In *Kearney v. Vann,* 154 N. C., 311, *Allen, J.,* says: "The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption and render the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify."

C. S., 2515, is an enabling statute; but for the statute the deed of a wife conveying land to her husband would be void. Such deed is valid only when the statute has been strictly complied with. The law is stated in 30 C. J., at page 757, sec. 379, as follows:

"Since a married woman's power to convey is wholly statutory, all the requirements of enabling statutes must be strictly complied with to render her deed valid, and her deed will be held invalid where there is a failure to comply with statutory requirements as to execution or acknowledgment. Where, however, there has been a substantial compliance with statutory requirements, her deed may be enforced, but there must be a substantial compliance with every requisite of the statute."

No deed from a wife to her husband, conveying her land to him, is valid, unless the officer who certifies that he privately examined the wife, as required by statute, shall also state in his certificate his conclusions that said deed is not unreasonable or injurious to her. The statute requires that both conclusions, to wit, that the deed is reasonable and not hurtful or injurious to the wife, shall be stated by the officer in his certificate attached or annexed to the deed. This Court has said that he must be satisfied that what she is doing is reasonable *and* not hurtful to her, and that he must so certify. *Kearney v. Vann, supra.* The certificate as to the ordinary, statutory privy examination is not sufficient. *Singleton v. Cherry, supra.* Each requisite of the statute must be substantially complied with. In the absence of such compliance the deed is void.

The certificate attached to the deed of Sabriana Blount to her husband, A. C. Blount, does not comply with every requisite of the statute. It is not stated therein that the justice of the peace found that her deed was not unreasonable. His conclusion that the deed was not injurious to her is not sufficient. The deed is, therefore, invalid; it does not divest Sabriana Blount of her estate in the land described therein, or convey said land to A. C. Blount. At the death of Sabriana Blount the land descended to her heirs at law, subject to the life estate of A. C. Blount, as tenant by the curtesy. The trustee in the deed of trust executed by A. C. Blount and his second wife has only an estate for the life of A. C. Blount in said land.

The judgment declaring that the deed of the commissioner appointed by the court to be made to the purchaser at the sale under the decree shall operate to convey to such purchaser the land in fee is modified in accordance with this opinion. The deed of the commissioner will convey to such purchaser only the life estate of A. C. Blount in said land. The grantors in the deed of trust conveyed thereby only such estate as they owned in the land at the date of the execution of their deed. The judgment as modified is

Affirmed.

STACY, C. J., dissenting: The decision in this case is put upon the ground that the deed from Sabriana Blount to A. C. Blount, her husband, is void because the officer who took the private examination of the wife failed to state in his certificate of probate, as required by C. S., 2515, "that the same is not unreasonable or injurious to her." The officer did certify, however, "that this deed is not ingerious to the said Sabrina Blount," meaning, of course, that the same is not injurious to her. But it is said in the opinion of the Court: "The statute requires that both conclusions shall be stated in the certificate"; that is, the conclusions that the deed is not unreasonable and is not injurious to her are both required to be stated in the certificate. I respectfully dissent from this position and from the judgment to be rendered in this case, for two reasons: First, because the double requirement, as I understand it, is not so nominated in the statute; and, second, because, in my opinion, the certificate attached to the deed in question complies substantially with the requirements of the law. *Dundas v. Hitchcock,* 12 How. (U. S.), 256, 13 L. Ed., 978.

Apparently, in all the cases dealing with the subject, certainly in all those cited in the Court's opinion, where the probate is held to be defective, no effort whatever was made by the officer to comply with the requirements of the statute, while the doctrine of substantial compliance, in relation to cognate statutes, or those dealing with the forms of probate, is fully upheld in a number of decisions. *Bank v. Canady,* 187 N. C., 493; *Bailey v. Hassell,* 184 N. C., 451; *Withrell v. Murphy,* 154 N. C., p. 89.

No benefit would be derived from an extended discussion of the question presented by the appeal. I think the word "or," as used in the statute, means *or,* while the Court says it means *and.* That is all there is in the case. A multiplicity of words would not make the two positions any clearer. The statement in *Kearney v. Vann,* 154 N. C., 311, cited as authority for the court's position, is obiter. Even in cases of doubtful construction, the rule of law is, that the court should uphold an instrument, if, by reasonable construction, it can be done. *"Ut res magis valeat quam pereat."* A maxim meaning "That the thing may prevail, rather than be destroyed." Applied in *R. R. v. Olive,* 142 N. C., 257, and *Foil v. Newsome,* 138 N. C., 115.

In my opinion the judgment should be affirmed without modification.

W. B. ELLIS v. C. B. POINDEXTER, TRUSTEE, L. V. SCOTT, AND G. D. LITTLE.

(Filed 13 April, 1927.)

Attorney and Client—Contracts.

After the termination of services rendered by an attorney to the client, a transaction by which the former accepts a note from his client in payment for such services is valid and enforceable by the attorney.

APPEAL by plaintiff from *Finley, J.,* at February Term, 1927, of FORSYTH. Affirmed.

This action was begun in Forsyth County Court to enjoin and restrain sale of land under power of sale in deed of trust executed by plaintiff. The note secured in the deed of trust had been assigned by the payee, L. V. Scott, to defendant, G. D. Little.

The issues submitted to the jury were answered as follows:

"1. Was the note and deed of trust executed while the relationship of attorney and client existed between plaintiff and defendant, L. V. Scott, as alleged in the amendment to the complaint? Answer: No.

"2. Is the defendant, G. D. Little, a holder in due course of the note, as alleged in his answer? Answer: Yes.

"3. In what amount, if any, is the plaintiff indebted to the defendant, G. D. Little, on the note described in the complaint? Answer: $950.00."

From judgment on the verdict plaintiff appealed to the Superior Court, assigning errors based upon exceptions to the charge of the court to the jury. Upon this appeal the assignments of error were not sustained. From judgment affirming the judgment of the county court plaintiff appealed to the Supreme Court.

T. W. Kellam for plaintiff.
Swink, Clement & Hutchins for defendants.

PER CURIAM. The consideration for the note executed by plaintiff and payable to the order of defendant, L. V. Scott, was services rendered to the plaintiff by the said Scott as an attorney at law. There was evidence that the litigation during which these services were rendered had terminated at the date of the execution of the note. The jury has so found, under instructions of the court, which are free from error. *Stern v. Hyman,* 182 N. C., 422. After the litigation had ended, the relationship of attorney and client no longer existed between the parties with respect to such litigation; it was competent for the parties to enter into a valid contract for the payment of services theretofore rendered.

Nor was there error in the instructions of the court upon the second or third issues. These instructions were in accordance with the law applicable to the facts as the jury might find them to be from the evidence.

There was no error in the refusal of the Superior Court to sustain plaintiff's assignments of error on his appeal from the judgment of the county court. The judgment is

Affirmed.

STATE v. BALDWIN.

(Filed 13 April, 1927.)

Criminal Law—Intoxicating Liquor—Aiding and Abetting—Evidence—Questions for Jury.

Where there is evidence tending to show that the defendant was not only present at the commission of the offense of unlawfully transporting intoxicating liquor, but actively participated therein, an issue of fact is raised for the determination of the jury.

CRIMINAL ACTION, tried before *Daniels, J.*, at December Term, 1926, of DURHAM.

The defendant was arrested upon a warrant charging that on or about 31 July, 1926, the defendant "did wilfully, maliciously and unlawfully sell, barter, transport, import, export, deliver, furnish, purchase or possess intoxicating liquor for the purpose of sale." The defendant pleaded not guilty, and the evidence tended to show that the officers of Durham County saw the car of the defendant leave the Alston Avenue road or highway and turn into the Ellis road and stop. When the pursuing officers saw that Baldwin's car had stopped they went near his car and saw some one out in the woods striking matches and walking about in different places. The defendant, Baldwin, and another man named Fuller came out of the woods to Baldwin's car and were arrested just before they got to the car. Fuller had five pints of whiskey in his shirt. Later in the night the officers went back in the woods where they had seen matches struck, and upon search found empty bottles and a half-gallon of whiskey. The empty bottles were the same sort that Fuller had when arrested. The place where the whiskey and bottles were found showed signs of a good deal of walking. Stumps had been bored up and the stump holes had the appearance of having been used for hiding whiskey. Baldwin did not have any whiskey on his person at the time of his arrest. Fuller said it was his whiskey.

The automobile belonged to Baldwin. The officers saw Baldwin striking matches close to where the whiskey was found. The defendant's car was searched and two empty pint bottles were found therein. "They were the same size and sort of bottles that Joe Fuller had in his shirt when we arrested them. I think they had the odor of liquor about them."

The defendant did not testify in person, but offered testimony to the effect that Fuller was drinking and that a friend of Fuller's requested him to drive "him about" in order to "sober him up."

Fuller was a witness for Baldwin, and testified that Baldwin knew nothing about the whiskey and had nothing to do with it.

The jury convicted the defendant of aiding and abetting in the transportation of whiskey, and from the sentence imposed by the court the defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Mel J. Thompson for defendant.

PER CURIAM. The various definitions and shades of meaning of aiding and abetting are contained in *S. v. Hart,* 186 N. C., 582. An approved definition of aiding and abetting is as follows: "In order for one to aid and abet the commission of a crime he must do something that will incite, encourage or assist the actual perpetrator in the commission of the crime. Mere presence, even with the intention of assisting in the commission of a crime, cannot be said to have incited, encouraged, or aided the perpetrator thereof, unless the intention to assist was in some way communicated to him. The law does not punish intent which is without influence on an act." Another approved definition is: "An abettor is one who gives aid and comfort, or who either commands, advises, instigates, or encourages another to commit a crime. A person who, by being present, by words or conduct, assists or incites another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act." *S. v. Jarrell,* 141 N. C., 722; *S. v. Cloninger,* 149 N. C., 567; *S. v. Hart, supra.*

The facts and circumstances of this case warrant a submission of the question to the jury, and it was the province of the jury to weigh the evidence and to draw from it such reasonable inferences as the testimony justified.

Upon the entire record we find no error of law, and are, therefore, compelled to affirm the judgment.

No error.

N. E. MOHN v. FRED L. CRESSEY.

(Filed 20 April, 1927.)

1. Courts—Jurisdiction—Justices of the Peace—Nonresident Defendants —Attachment—Garnishments—Process—Statutes.

The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant who is a nonresident of the State, and is only incidental to the relief sought in the original action, C. S., 819, and the warrant in garnishment may run beyond the limits of the county wherein the action was brought.

2. Same—Publication of Summons—Continuance—Interpleader.

Where funds of a nonresident defendant have been attached in an action brought before a justice of the peace in a different county, the justice may continue the case until service of summons by publication has been made on the nonresident defendant, and a motion to dismiss made by an intervener claiming the funds for want of jurisdiction of the justice under these circumstances, will be denied, C. S., 1500. Rule 17. The provisions of C. S., 1489 do not apply.

3. Attachment—Garnishment—Court's Jurisdiction.

Attachment of the property of nonresident defendants in this State is a proceeding *quasi in rem,* for the purpose of bringing him under the jurisdiction of the State Court for the purpose of determining the controversy in the action brought against him, when properly constituted.

APPEAL by plaintiff from *Sinclair, J.,* at October Term, 1926, of CRAVEN. Reversed.

The defendant and the Citizens National Bank of Boston, intervener, entered a special appearance in the court of a justice of the peace, and in the Superior Court upon appeal, and moved to vacate a warrant of attachment and to dismiss the action. At the hearing the judge presiding found the following facts:

1. The plaintiff, N. E. Mohn, is a resident of Craven County, N. C.; the defendants, Fred L. Cressey and Citizens National Bank of Boston, are residents of Boston, Mass., and none of the parties connected with this suit are residents of Craven County, except the plaintiff.

2. On 29 December, 1924, plaintiff instituted suit against defendant Fred L. Cressey before C. J. Hancock, a justice of the peace of Craven County, N. C., to recover the sum of $191.16 for breach of contract. Summons was issued to Edgecombe County, N. C., but no personal service was made on any defendant, except on the garnishee, Farmers Banking and Trust Company of Tarboro, Edgecombe County, N. C., which process against the garnishee was issued and service made after special appearance and before trial entered by Fred L. Cressey and Citizens National Bank of Boston.

Upon affidavits filed, a writ of attachment was issued to Edgecombe County, and notice of attachment and summons published against defendant Fred L. Cressey.

The sheriff of Edgecombe County attached a fund of $560 in Farmers Banking and Trust Company of Tarboro, N. C., which plaintiff in his affidavit alleged was the property of the defendant, Fred L. Cressey, which fund represented proceeds of three drafts with bills of lading drawn by Fred L. Cressey in favor of Citizens National Bank of Boston, Mass., against L. L. Stancill of Tarboro, N. C.

3. When the case came on to be heard before C. K. Hancock, justice of the peace at New Bern, N. C., the defendant Fred L. Cressey, through counsel, entered a special appearance and moved to vacate the attachment and dismiss the action on the ground of lack of jurisdiction, as set out in motion filed, which motion was overruled, and defendant Cressey excepted; thereupon, defendant, through counsel, requested the court to remove the case for trial, and same was removed for trial to Walter Fulford, justice of the peace of Craven County, N. C.

4. When the case came on for trial before Walter Fulford, justice of the peace at New Bern, N. C., the Citizens National Bank of Boston, through counsel, entered a special appearance and moved to vacate attachment and dismiss the action, said bank claiming to be owner of funds attached as purchaser of drafts with bill of lading attached from Fred L. Cressey, for the reason of lack of jurisdiction, as set out in the motion filed. Motion was overruled, and Citizens National Bank of Boston excepted. The court then proceeded to try the case, and rendered judgment in favor of plaintiff; both Fred L. Cressey and Citizens National Bank of Boston excepted and appealed. Counsel for Cressey reserving his special appearance above entered, renewed his special appearance before Fulford, J. P., and also excepted to the judgment.

When the case came on for trial in this court, each defendant, Fred L. Cressey and Citizens National Bank of Boston, intervener, entered a special appearance and renewed the motion to vacate attachments and dismiss the action for want of jurisdiction for reasons set out in the motions filed.

Upon the foregoing findings of fact, judgment was rendered vacating the attachment and dismissing the action. The plaintiff excepted and appealed, assigning error in the judgment.

W. H. Lee for plaintiff.
H. P. Whitehurst for defendant.
T. D. Warren for the Citizens National Bank of Boston.

ADAMS, J. The basic reason of the motions to dismiss the action is the alleged want of jurisdiction. Fred L. Cressey says: (1) That he is the only defendant; that the summons, which was issued by a justice of the peace in Craven County and addressed to an officer of Edgecombe County, is void, and that the court had no jurisdiction of his person; (2) that no publication of the summons has been made; and (3) that the Farmers Banking and Trust Company, whose funds were attached, is not a party to the action. The Citizens National Bank of Boston rests its motion substantially on the ground first above set forth. We understand from the second paragraph of the statement of facts that both the notice of attachment and the service of the summons were "published against the defendant," and that personal service was made on the garnishee, Farmers Banking and Trust Company, who did not appeal from the judgment. C. S., 819. The mere fact that the appellees entered a special appearance before the garnishee was served did not deprive the magistrate of his authority to continue the cause until service could be made. He ordered a continuance, and the garnishee was served before judgment was rendered or the case was determined. The vital question, then, is that of jurisdiction.

It is provided that no process shall be issued by a justice of the peace to any county other than his own, unless one or more *bona fide* defendants shall reside in and one or more *bona fide* defendants shall reside outside his county, in which case only may he issue process to any county in which such nonresident defendant resides. C. S., 1489. Hence, the justice would have acquired no jurisdiction of the defendant's person by virtue of the summons issued in Craven and addressed to the sheriff, constable, or other lawful officer of Edgecombe, even if it had been personally served in the latter county. "A justice, having no jurisdiction to issue process running out of his county, is confined to the statutory method of acquiring jurisdiction of the person." *Rutherford v. Ray*, 147 N. C., 253. But the fact that this summons could not run beyond the limits of Craven County does not necessarily determine the validity or invalidity of the judgment. The original summons, dated 29 December, 1924, was returnable on 28 January, 1925. The officer's return was, "Not to be found in Edgecombe County." The defendant, who was a nonresident of the State, could not be personally served with process; the issuance of the summons on which the return was made was therefore not necessary. A civil action must be commenced by issuing a summons, except where the defendant cannot be personally served because he is beyond the reach of process, in which event it may be instituted by affidavit, warrant of attachment, and service of summons by publication. In such case the summons is not directed to an officer of any particular county. *Best v. Mortgage Co.*, 128 N. C., 351; *Grocery Co. v. Bag Co.*, 142 N. C., 174, overruling *McClure v. Fellows*, 131 N. C., 509; *Currie v. Mining Co.,* 157 N. C., 217; *Armstrong v. Kinsell,* 164 N. C., 125; *Mills v. Hansel,* 168 N. C., 651; *Jenette v. Hovey,* 182 N. C., 30.

Attachment is not strictly a proceeding *in rem,* because the judgment is conclusive only upon the actual parties to the litigation and those in privity with them; it is a proceeding *quasi in rem,* the court acquiring jurisdiction by attachment of the debtor's property. The warrant is designed to serve the two-fold purpose of compelling the appearance of the defendant and of seizing and holding his property for payment of the debt—*pone per vadium et salvos plegios,* put by gage and safe pledge John Doe, the defendant. It is a provisional remedy, and as such does not affect the decision of the case upon its merits. *Hornthall v. Burwell,* 109 N. C., 10; *Armstrong v. Kinsell, supra;* C. S., 484 *et seq.;* 798 *et seq.;* 6 C. J., 31, sec. 4 (2).

The record contains the affidavit, the order of publication, the warrant of attachment, the undertaking, and the complaint, which substantially comply with the law; also the notice of the summons and the warrant of attachment, which, according to the facts found, were duly published. The object of the publication was to give notice of the summons and attachment, and to warn the defendant to appear on the return day and answer or demur to the complaint.

The appellees contend that the justice was prohibited by C. S., 1489, from issuing the warrant of attachment to an officer in Edgecombe County; that, in consequence, there was no lawful seizure of the defendant's property; and that as publication of the summons could not be effectual without such seizure, the judgment is free from error. It may be granted that in the absence of an attachment levied on the property of a nonresident of the State, constructive service, or service by publication, is ineffective, and that when a warrant of attachment has been issued, the court acquires jurisdiction only to the extent that the attached property will satisfy the plaintiff's recovery. *Everitt v. Austin,* 169 N. C., 622; *Currie v. Mining Co., supra; Winfree v. Bagley,* 102 N. C., 515. But the judge found as a fact that the sheriff of Edgecombe County had attached a fund in possession of the garnishee as the property of the defendant, and the question with which we are now concerned is whether the attachment was void because it was addressed by a justice of the peace in Craven to an officer in another county. In the sense in which it is used in C. S., 1489, does "process" mean a writ which is provisional or ancillary as well as a writ which is issued by authority of law for the purpose of bringing the defendant into court? Does it include a warrant of attachment?

In *Fisher v. Bullard,* 109 N. C., 574, the Court said: "We do not find any statute making the provisions of the Code of Civil Procedure

(C. S., 463), as to the place of trial, applicable to trials before a justice." But among the rules of practice enacted for a justice's court is this: "The chapter on civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and wherein the title to real estate is not in controversy." C. S., 1500, Rule 17. Procedure by attachment is therefore regulated by statute contained in the chapter referred to. If the warrant of attachment is issued by a justice of the peace, it shall be directed to the sheriff, or any constable of any county in which the property of the defendant is located, and shall require the officer to attach and safely keep all such property, or so much as may be necessary to satisfy the plaintiff's demand; and several warrants may be issued at the same time to different counties. C. S., 801, 805. The former statute, of which section 805 is a modification, contained the clause, "Provided such county be that of the justice issuing the warrant" (Battle's Revisal, 186, sec. 203; The Code, sec. 357); but the proviso was subsequently stricken from the statute. Public Laws 1895, ch. 435. The amendment apparently indicates the legislative intent to extend the reach of the warrant of attachment, as distinguished from original process, beyond the boundaries of the county in which the justice resides.

If, as in this case, the action is founded on contract, and the sum demanded does not exceed two hundred dollars, the warrant must be obtained from and made returnable before a justice of the peace of a county to the Superior Court of which it would have been returnable had the sum demanded exceeded two hundred dollars. C. S., 809. If the sum demanded had exceeded this amount, what would have been the procedure? Since the defendant is a nonresident of the State, the action would have been commenced in the Superior Court of the county in which the plaintiff resides, and would have been returnable in term to the court from which the summons issued. C. S., 469, 801. As the action was brought in Craven, the warrant, by virtue of the statute, was properly returnable before the justice of this county. These facts should be borne in mind: the defendant Cressey is a nonresident of the State, the Farmers Banking and Trust Company is garnishee, and the Citizens National Bank of Boston is intervener. Want of authority in the justice to issue original process to any county other than his own did not inhibit the running of the warrant of attachment to another county, or the service of a notice upon the garnishee to appear before the court to which the attachment was returnable to answer upon oath as the statute provides; for issuing the warrant was only incidental to the original action. C. S., 819; *Baker v. Belvin,* 122 N. C., 190.

As to the intervening bank, the only question is whether it is entitled to the property, not whether there is irregularity in the attachment. *Sitterson v. Speller,* 190 N. C., 192.

The judgment vacating the attachment and dismissing the action is reversed, and the cause is remanded for further proceedings.

Reversed.

E. F. MARTIN v. CITY OF GREENSBORO AND THE NORTH CAROLINA PUBLIC SERVICE COMPANY, INC.

(Filed 20 April, 1927.)

1. **Municipal Corporations—Cities and Towns—Government—Negligence.**

Where a city has control of the planning of the tracks of a street car system upon its streets, in so acting it exercises a sound discretionary power under the principles of government, and is not liable therein for an injury caused to one by the improvident placing of a line of street car tracks nearer than was safe for the passing of motor and other vehicles upon the street. Upon this appeal from overruling the defendants' demurrer it is assumed that the city acted under a legislative power and had properly adopted a plan for placing the tracks of its codefendant upon its streets.

2. **Same—Pleadings—Demurrer.**

Where the complaint alleges damages against a city only for its failure to properly exercise a discretionary governmental power, a demurrer is good.

3. **Same—Statutes.**

The right of a city to plan the laying out and maintenance on its streets of the tracks of a street railway corporation is derived from statute or special charter.

APPEAL by the city of Greensboro from a judgment of *Schenck, J.,* given at the February Term, 1927, of GUILFORD, overruling the appellant's demurrer to the complaint. Reversed.

A. C. Davie and Frazier & Frazier for plaintiff.
Robert Moseley for defendant.

ADAMS, J. The plaintiff brought this suit against the defendants to recover damages for injury to his automobile, said to have been caused by their joint or concurrent negligence. After alleging that the public service company negligently caused one of its street cars, while operated on Tate Street, to strike his machine, and thereby to injure it, the plaintiff states as against the other defendant the following cause of action: "That the said city of Greensboro negligently and carelessly placed the curbing for the sidewalk on the east side of Tate Street in such close proximity to the street car track of its codefendant, the North Carolina Public Service Company, Inc., as to make it impossible for vehicles to pass on the right-hand side of the said street car track, as such vehicles proceeded northwardly on said Tate Street, and negligently and carelessly permitted the said North Carolina Public Service Company, Inc., to lay its street car track in said street in such close proximity to the curbing on the east side of the said Tate Street as to make it impossible for automobiles or other vehicles proceeding northwardly along said Tate Street to pass on the right-hand side of the street cars proceeding southwardly on the said street car line, when it knew, or by the exercise of ordinary care could have known, that persons operating motor vehicles and complying with the law and ordinances by passing to the right of approaching vehicles and street cars would be placed in a position of peril, and that by so constructing the curbing and signals, and permitting the street car track to be laid in such close proximity thereto, it created a death trap that proximately and concurrently, together with the acts of negligence of its codefendant as herein alleged, caused the injury and damage of plaintiff's automobile."

To this cause of action the city filed the following demurrer: "As appears from the face of the complaint, the negligence charged against the city occurred in the discharge of its governmental or legislative functions, for negligence in the discharge of which a municipal corporation is not liable in damages."

The demurrer presents the question whether it is negligence for which a municipal corporation may be liable in damages, to build a sidewalk so near a street railway track, or to allow a street railway company to build its track so near a sidewalk as to leave insufficient space for an automobile (observing the direction to keep to the right) to pass between the sidewalk and a car on the track.

Municipal corporations derive their powers from the Legislature, and these powers are usually conferred by general statutes or by special charters. So, likewise, as to public-service corporations. As the case comes to this Court for the review of a judgment overruling the appellant's demurrer, the charter of neither defendant is before us. Under these circumstances, we shall assume for the present purpose that in laying its track the public service company was subject to the right and power of the city to direct and supervise the location of the roadbed. *Postal Co. v. Railroad,* 219 Ill. A., 304; *Scranton Co. v. Scranton,* 214 Pa., 586; *Waterloo v. Street Ry. Co.,* 32 N. W., 329; *Gas Light Co. v. Drainage Commission,* 197 U. S., 453, 49 Law Ed., 831; 28 Cyc., 851. But in view of the allegations in the complaint, we must furthermore assume that the sidewalks were built and the railway track was laid in pursuance of a plan approved and adopted by the authorities of the city. We are not at liberty to conclude that they acted without deliberation or without due regard to the safety of the public. If they erred, at least the reasonable inference is that their error was one of judgment. It is generally held that a municipal corporation is not liable for injuries to person or property resulting from its adoption of an improper plan when the defects in such plan are due to mere error of this kind. 19 R. C. L., 1091, sec. 376. It must follow that the exercise of judgment and discretion in the adoption by the city of a general plan for the improvement of its streets, the building of its sidewalks, and the selection or approval of the space to be occupied by the track of the street railway is not subject to revision by a court or jury in a private action for damages based on the theory that the plan was not wisely or judiciously chosen; although a private action may be maintained for defective construction of the work, or failure to keep it in repair. Herein is the distinction between injuries resulting from the plan of a public improvement made in a city or town and those resulting from the mode of its execution. The adoption of the general plan involves the exercise of judgment; the duty of constructing and maintaining the work done in pursuance of the plan is ministerial. The exercise of discretionary or legislative power is a governmental function, and for injury resulting from the negligent exercise of such power a municipality is exempt from liability. *Scales v. Winston-Salem,* 189 N. C., 469; *Detroit v. Beckman,* 34 Mich., 125, 22 At., 507; *Diamond Match Co. v. New Haven,* 55 Conn., 510, 3 A. S. R., 70; *Johnston v. District of Columbia,* 118 U. S., 19, 30 Law Ed., 75.

The demurrer, we are aware, admits the allegations of complaint. *Sandlin v. Wilmington,* 185 N. C., 257. But scrutiny of these allegations discloses as the only asserted ground of negligence such proximity of the sidewalk and the railway track as does not leave sufficient intervening space for an automobile and a street car to pass each other without a collision. This allegation is directed to the breach of a judicial and not a ministerial duty; it seeks to take advantage of an alleged error resulting from an exercise of judgment; and, as we have said, such exercise of judgment is not subject to review in a private action for damages. We think the demurrer filed by the city of Greensboro should have been sustained. This conclusion, of course, does not affect the other alleged cause of action.

Judgment is
Reversed.

THE CITIZENS NATIONAL BANK OF BALTIMORE v. ANGELO BROTHERS ET AL.

(Filed 20 April, 1927.)

1. **Pleadings—Demurrer —Actions—Dismissal—Counterclaim—Parties—Causes of Action—Statutes.**

   In an action by a holder in due course for value to recover against the maker of the instrument when upon defendant's motion the officers and directors of the payee bank and its receiver have been made parties, the defendants' cross-action alleging payment to the payee bank and fraud of its officers and directors, and demanding judgment over against them if plaintiff recover judgment in the action as at first constituted, is a misjoinder of both parties and causes of action, the alleged action against the receiver sounding in contract and the other in tort, and the cross-action will be dismissed. C. S., 507.

2. **Same—Separable Controversies—Statutes.**

   Where from the complaint it appears that there has been a misjoinder of both parties and causes of action, C. S., 516, wherein a separation or division of the causes of action will be ordered by the court, does not apply.

APPEAL by certain of the defendants from *Oglesby, J.,* at chambers, 1 March, 1927. From FORSYTH.

Civil action to recover on a 60-day negotiable promissory note for $5,000, alleged to have been executed by Angelo Brothers to the Merchants Bank and Trust Company, 13 March, 1926, duly endorsed to the plaintiff for a valuable consideration, before maturity and without notice of any defect or equity, constituting the plaintiff a holder thereof in due course.

The defendants, M. A. Angelo and T. J. Angelo, partners, trading as Angelo Brothers, answered, alleging that on 23 April, 1926, before the note was due, the sum of $4,985 was paid by them to Thomas Maslin, president and managing officer of the Merchants Bank and Trust Company, in payment of said note; that the same was not surrendered because the said Maslin, with fraudulent intent, falsely represented that it was lost or misplaced, and that it would be surrendered as soon as found; that the note was then and is now in the possession of the plaintiff as collateral security; and that on the date of payment, and thereafter until closed by the Corporation Commission, the said Merchants Bank and Trust Company was insolvent, and known by its officers and directors to be insolvent. Whereupon, Angelo Brothers asked that the receiver of the Merchants Bank and Trust Company, together with its officers and directors, be made parties defendant in this action, to the end that they might have judgment over against them in case the plaintiff be awarded judgment on the note in suit.

Upon the receiver and the officers and directors of the Merchants Bank and Trust Company being made parties defendant, Angelo Brothers filed an amended answer and cross-complaint, alleging in effect:

1. That they are entitled to compel the plaintiff to satisfy its demand out of other collateral held by it.

2. That they are entitled to recover of the receiver of the Merchants Bank and Trust Company the sum of $4,985, because of the fraud of its president in wrongfully obtaining said sum and refusing to apply it to the payment of said note.

3. That they are entitled to recover of the defendant Thomas Maslin whatever loss is sustained on account of his fraudulently inducing them to part with their money.

4. That they are entitled to recover of the officers and directors of the Merchants Bank and Trust Company any loss sustained by them because said directors knowingly permitted the bank to remain open while insolvent, thus obtaining their money fraudulently, etc.

To the cross-complaint of Angelo Brothers, the appellants herein, C. A. Kent, W. H. Watkins, T. V. Edmunds, W. H. Maslin, W. H. Hanes, Wade H. Bynum, S. F. Vance, and S. D. Craig, directors of the said Merchants Bank and Trust Company, severally demurred upon the ground of a misjoinder of both parties and causes of action. From a judgment overruling said demurrers, the demurring defendants appeal, assigning errors.

No counsel for plaintiff.

King, Sapp & King, Benbow, Hall & Benbow, and Ratcliff, Hudson & Ferrell for C. A. Kent, appellant.

Brooks, Parker, Smith & Hayes and Swink, Clement & Hutchins for W. H. Maslin, W. M. Hanes, and S. D. Craig, appellants.

Hastings & Boone for W. H. Watkins, appellant.

King, Sapp & King and W. T. Wilson for T. V. Edmunds, appellant.

L. M. Butler for Wade H. Bynum, appellant.

Wallace & Wells for S. F. Vance, appellant.

Moses Shapiro for Angelo Brothers, appellees.

STACY, C. J., after stating the case: The cross-actions of Angelo Brothers as against the receiver, on the one hand, and the officers and directors of the Merchants Bank and Trust Company, on the other, are separate and distinct; they are founded on different causes of alleged liability—the one sounding in contract, the other in tort; they are set up against different parties; and they are incorporated in the same complaint. Under all the decisions, such a pleading is subject to demurrer.

Harrison v. Transit Co., 192 N. C., 545; *Rogers v. Rogers,* 192 N. C., 50; *Lee v. Thornton,* 171 N. C., 209; *Quarry Co. v. Construction Co.,* 151 N. C., 345, and cases there cited.

The several causes of action which may be united or joined in the same complaint are classified and enumerated in C. S., 507; and, in addition, the following limitation is expressly incorporated therein: "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated." See *R. R. v. Hardware Co.,* 135 N. C., 75; *Gattis v. Kilgo,* 125 N. C., 133.

But it is suggested that even if the several causes of action have been improperly united in the same pleading, a separation or division should be ordered under C. S., 516. It is well settled that where there is a misjoinder, both of parties and of causes of action, and a demurrer is interposed upon this ground, the demurrer should be sustained and the action dismissed. *Robinson v. Williams,* 189 N. C., 256; *Bickley v. Green,* 187 N. C., 772; *Shore v. Holt,* 185 N. C., 312; *Rose v. Warehouse Co.,* 182 N. C., 107; *Roberts v. Mfg. Co.,* 181 N. C., 204; *Campbell v. Power Co.,* 166 N. C., 488; *Thigpen v. Cotton Mills,* 151 N. C., 97; *Morton v. Tel. Co.,* 130 N. C., 299; *Cromartie v. Parker,* 121 N. C., 198.

This case presents a striking illustration of the wisdom of the rule established by these decisions. If the plaintiff hold the note in suit only as collateral, and the remaining collateral held by it be amply sufficient, as alleged, to discharge its obligation, then the bringing into this suit of the other defendants would seem to be wholly unnecessary. At any rate, we think the demurrers filed herein are well founded, and that the cross-actions, as against the demurring defendants, should be dismissed.

Reversed.

A. VALENTINE ET UX. v. NORTH CAROLINA GRANITE CORPORATION.

(Filed 20 April, 1927.)

1. **Tenants in Common—Voluntary Division—Deeds and Conveyances—Joinder of Wife—Dower—Estoppel.**

   The voluntary division of lands by tenants in common creates no new estate in the lands, but only apportions the land by their interchangeable deeds that each was compellable to take under a division by court process; and where the division so made is fair and equitable, it is unnecessary for their wives to join in the conveyance to estop them from claiming their interests therein.

2. Same—Case Agreed—Statutes—Appeal and Error—Facts—Remand.

Where a controversy, properly constituted, is submitted without action, C. S., 626, involves the question as to the necessity of the wife of a tenant in common to join in his deed voluntarily given to divide the lands between himself and the other tenants in common, on appeal the case will be remanded if it does not appear in the facts agreed that the division so made was a fair and equitable one.

APPEAL by defendant from *Hannibal L. Godwin, Emergency Judge,* at November Special Term, 1926, of SURRY.

Civil action for specific performance, submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey certain lands to the defendant, duly executed and tendered a deed therefor, and demanded payment of the purchase price as agreed, but the defendant declined to accept the deed, and refused to make payment, claiming that the title offered is defective.

On the facts agreed, the court, being of opinion that the plaintiffs were able to convey a good and sufficient title, gave judgment for the plaintiffs, from which the defendant appeals, assigning errors.

No counsel for plaintiffs.
Folger & Folger for defendant.

STACY, C. J. The parties to the present proceeding, having a question in difference which might properly become the subject of a civil action, have submitted the same for determination without action, upon an agreed statement of facts, as authorized by C. S., 626.

The question to be determined is whether, in a voluntary partition of lands, a deed executed by one tenant in common to another, without the joinder of his wife, is sufficient to bar the wife's inchoate right of dower to the land assigned to the other cotenant.

His Honor was of the opinion, and so held, that, as partition is an incident to an estate held by tenants in common, compellable in law as a matter of right at the instance of any of the cotenants entitled to possession, the wife's inchoate right of dower attaches to the parcel assigned to her husband, and is released as against the parcel assigned to the other cotenant, when the partition is voluntarily effected, and this upon the theory that a wife is not a necessary party to such a proceeding, nor is it essential that she join in any conveyance required to consummate it. *Napper v. Ins. Co.,* 107 Ky., 134; 20 R. C. L., 783; 30 Cyc., 157; 19 C. J., 473; Note, 57 L. R. A., 340.

Under the pertinent decisions, the correctness of this position, it would seem, depends upon whether the partition was fair and equitable, or, if not, whether the circumstances are such as to bar the wife by estoppel or otherwise. *Mosher v. Mosher,* 32 Me., 412; 30 Cyc., 158; Note, 57 L. R. A., 340.

Freeman, in his work on "Cotenancy and Partition," in epitomizing the decisions on the subject, states the law as follows: "As the husband is compellable by legal proceedings to make partition with his cotenants, it is universally conceded that he may do voluntarily that which the law will otherwise oblige him to do. Whenever, therefore, the husband perfects a voluntary partition, the dower interest of his wife is thereby removed from the purparties of the other cotenants, and confined to the purparty of the husband. *Femes covert* seeking to assert dower rights 'will be restricted, both at law and in equity, to the allotments of their husbands, and will be estopped from seeking to have dower assigned on undivided shares of other parcels. By confining them to the equal shares which their husbands take in the partition, they have all the dower the law gives them.' (*Totten v. Stuyvesant,* 3 Ed. Ch., 503.) A voluntary partition is allowed to operate upon inchoate rights of dower, because these rights are not thereby destroyed or impaired, but affected substantially in the same manner that the estates of the husbands are affected—an undivided interest in the whole property becomes a several interest in a specified parcel. Whenever the husband exercises his power of making voluntary partition, for the purpose of destroying the wife's rights, or of accomplishing a fraud upon her, he is not acting as the law would compel him to act, and the reason for holding the wife bound by his partition fails. (*Potter v. Wheeler,* 13 Mass., 506.) Hence, if he makes partition, taking the smaller and less valuable purparty, and receiving a compensation for so doing, the wife's right to have her dower assigned at his death will not be restricted to the lesser purparty."

It is the uniform holding in all the cases, as shown from the synopsis below, that where there is a partition of realty by consent, and the tenants in common execute mutual releases to each other, no new estate or title is conveyed thereby, but the partition deeds operate only to sever the unity of possession and to assign to each in severalty, by metes and bounds, that which was already his. Such deeds simply adjust the different rights of the parties to the possession and create no new estate. *Harrison v. Ray,* 108 N. C., 215. "Partition deeds between tenants in common operate only to sever the unity of possession, and convey no title." *Power Co. v. Taylor,* 191 N. C., 329. In *Harrington v. Rawls,* 131 N. C., 39, it was held that "a deed of partition conveys no title. It is simply a severance of the unity of possession." And in *Jones v. Myatt,* 153 N. C., 225, it was said that actual partition "does not create or manufacture a title," but merely designates the share of each tenant in common, and allots it to him in severalty. Again, in *Carson v. Carson,* 122 N. C., 645, it was said that upon an actual partition of lands among tenants in common, "the tenants take their respective shares or allotments by descent, and not by purchase," and their deeds convey no real estate, but simply ascertain by metes and bounds the interest of each.

The subject of partition is thoroughly discussed in *Weston v. Lumber Co.,* 162 N. C., 165, where it was held that, when the title is not in controversy, the effect of a partition is to designate and allot to each tenant his share in severalty, but does not create any title which he did not have before. See, also, *Stallings v. Walker,* 176 N. C., 321.

In the case at bar, the record is silent as to the determinative facts; hence, we apprehend, the agreed statement is not sufficiently full to warrant the Court in deciding the question sought to be presented. It is not agreed that the partition was just and equal, and the wife of John Valentine, whose inchoate right of dower is sought to be foreclosed, is not a party to this proceeding. The cause, therefore, will be remanded to the Superior Court of Surry County for further proceedings, not inconsistent with the usual course and practice in such cases.

Remanded.

STATE v. J. Q. ADAMS.

(Filed 20 April, 1927.)

1. **Criminal Law—Evidence—Character—Impeaching Evidence.**
   Where a defendant has not testified in his own behalf, his general character has not been put in issue, and it is reversible error for his wife to testify against it as to particular instances.
2. **Criminal Law—Evidence—Impeaching Evidence—Husband and Wife.**
   Upon the trial of an assault with attempt to commit rape, testimony of the defendant's wife in effect that he had theretofore been several times arrested for a criminal offense, is erroneously admitted as tending to impeach his character in a criminal action.

CRIMINAL ACTION, tried before *H. L. Godwin, Emergency Judge,* at November Special Term, 1926, of SURRY.

The defendant was tried upon a bill of indictment charging rape. The verdict of the jury was, "Guilty of assault and attempt to commit rape," and thereupon the verdict was entered upon the record of the court as "Guilty of assault with intent to commit rape."

From judgment, sentencing the defendant to the State's prison for a term of ten years, he appealed, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Folger & Folger for defendant.

BROGDEN, J. The defendant did not testify in his own behalf, but his wife, among other witnesses, testified in his behalf. Upon cross-examination of the wife, the solicitor asked her the following question, referring to her husband, the defendant: (Q.) "That wasn't the first time he had been up, was it?" (A.) "No, sir; because I thought he has been jerked up more times than one unjust."

The effect of this evidence was to put before the jury the fact that the defendant had previously been charged with or arrested for crime. For all practical purposes, this amounted to proving the bad character of the defendant by proof of specific acts, or impeaching his character when he had not testified in his own behalf.

In *S. v. Holly,* 155 N. C., 485, the Court has held that a defendant charged with crime may offer evidence of his good character, and thereupon the State may offer evidence of his bad character, "but cannot, by cross-examination or otherwise, offer evidence as to particular acts of misconduct." This rule is both sound and salutary, for the reason that it obviates a mass of collateral questions which would interminably prolong trials and inevitably result in drawing the minds of the jurors far afield from the merit of the case. *S. v. Bullard,* 100 N. C., 487; *Marcom v. Adams,* 122 N. C., 222; *Coxe v. Singleton,* 139 N. C., 362; *S. v. Murdock,* 183 N. C., 779; *S. v. Colson, ante,* 236; *S. v. Canup,* 180 N. C., 739.

The evidence was incompetent in another aspect, for the reason that the wife cannot testify against the husband in a criminal action of this nature. It cannot be successfully maintained that the testimony complained of was "not against the husband," because it tended directly to impeach the husband's character. *S. v. Harbison,* 94 N. C., 885; *S. v. Raby,* 121 N. C., 682; *Grant v. Mitchell,* 156 N. C., 15; *Powell v. Strickland,* 163 N. C., 394; *S. v. Aswell and Smith, ante,* 399.

There are other serious exceptions in the record, but, as a new trial must be awarded, they will not be discussed, as they may not occur at the subsequent trial.

New trial.

J. T. HARRIS v. W. P. SINGLETARY.

(Filed 20 April, 1927.)

1. **Evidence—Written Instruments—Letters—Original Writings—Copies.**

The original of a letter sought to be introduced in evidence, unless collateral to the controversy or issue, is the best evidence of its contents, and a copy may not be received unless it is shown by competent witnesses that it had been destroyed or lost, and could not be found after a reasonable search.

2. **Same—Clerks of Court—Justices' Courts.**

Where a letter introduced on a trial of a criminal action is transmitted on defendant's appeal to the clerk of the Superior Court, a copy thereof of record may not be testified to on the trial of a civil action for false arrest in the Superior Court, when involved in the issue, without showing the loss of the original by the clerk to whom it had been given, or showing by a recognized legal way that the original could not reasonably have been introduced. *Semble*, a justice's court is partly one of record under C. S., 1482.

3. **Evidence—Appeal and Error—Admissions.**

Where the defendant in an action for damages for false arrest has admitted substantially the contents of a letter material to the inquiry, and not collaterally involved thereon, the erroneous admission of a copy thereof is cured.

4. **Criminal Law—False Arrest—Evidence—Malice—Admissions — Statutes—Appeal and Error.**

Where the justice of the peace has testified on the trial to recover damages for false arrest that he considered the criminal action "frivolous and malicious," and had taxed the defendant (prosecutor) with cost, the erroneous admission of this evidence is cured by the defendant's admission that he had paid the cost thus taxed against him. C. S., 1288.

5. **Criminal Law—Appeal and Error.**

The defendant in a criminal action may appeal from a justice's court to the Superior Court from an adverse judgment taxing him with cost.

6. **False Arrest—Termination of Criminal Action—Evidence—Judgment.**

It is necessary for the plaintiff in an action to recover damages for false arrest, to show the successful determination of the criminal action, and the judgment thereon is properly admitted in evidence when confined to the required purpose.

7. **False Arrest—Malice—Evidence—Criminal Law.**

Where the prosecutor in a criminal action has appealed from an adverse judgment of a justice of the peace taxing him with costs, and has afterwards withdrawn his appeal and paid the cost, it is sufficient evidence of malice, etc., to be submitted to the jury.

8. **Arrest and Bail—False Arrest—Malice—Issues—Questions for Jury.**

In order to issue execution against the person of the defendant in an action to recover damages for false arrest, an issue upon the fact of actual or express malice must have been submitted to and affirmatively found by the jury.

APPEAL by defendant from *Sinclair, J.*, and a jury, at October Term, 1925, of CRAVEN.

This is a civil action instituted by plaintiff against defendant for "falsely and maliciously, and without any reasonable or probable cause" procuring a warrant from a justice of the peace and having him arrested on a charge of larceny on 5 June, 1921, of a *certain letter.* Defendant denied the material allegations.

The warrant was sworn out on 28 December, 1921, before W. R. Wood, a justice of the peace. The case was removed at the instance of plaintiff, and it was sent by Wood to J. R. Hardy for trial. It was heard on 11 January, 1922, and Hardy dismissed the case as *frivolous and malicious,* and taxed Singletary, the defendant in this case, with the cost. Singletary appealed and Hardy handed the papers to the clerk of the Superior Court. The appeal was withdrawn on 24 January, 1922, and Singletary paid the cost.

Plaintiff testified in part: "I am in the store fixture business, and office fixtures, being secretary-treasurer and manager of The Scott Register Company. When I am on the road I call on the trade selling fixtures and am out about fifty per cent of my time. The Scott Register Company had sold Mr. Singletary a refrigerator, and there was a difference with reference to the cost of handling it, and he had left it in the station. That suit was closed in court and we got a judgment against him for it. . . . Singletary claimed that I took a letter that he considered of importance in that civil suit. The letter was addressed to Graham & Singletary, and was in regard to the cancellation of an order. Singletary handed it to me to read, and when I finished I said 'What's your nearest telephone?' and he said 'You can go next door and get one,' and I went out with the letter in my hand, and I folded it up and put it in my pocket, and when I came back Graham asked me for the letter, and I said I didn't want it, that I had a copy of it. He didn't object to my taking the letter out of the store at all. He handed me the wide-open letter. When I gave the letter back I told Singletary I was going to make him pay for the refrigerator or cost of handling it, which I did, and the court gave me a judgment for it. He considered that the letter referred to as being taken out of the store by me was a part of his defense in the civil action as to the cancellation of the order. That particular letter was the only one he was concerned about." He further testified that Singletary testified at the trial before the justice of the peace that he, plaintiff, stole the letter and was a menace to society. Singletary prepared a letter to the like effect and read it at the trial; said he was a common thief, and he was not so much interested in the money proposition, but as a menace to society to have him locked up. He testified to the humiliation of his arrest and the effect on his business. The trial before the justice of the peace was held in the presence of about twenty-five people.

The warrant was sworn out in Wilson County, and the sheriff arrested him in Craven County, where he lived. He was tried in Wilson County.

Defendant testified to the effect that he was in partnership with one George W. Graham. "Mr. Graham received a letter from the Scott Register Company about countermanding an order for a refrigerator after we had dissolved partnership. Mr. Graham had possession of the letter. In consequence of that information, I swore out a warrant against Mr. Harris for stealing the letter." . . . . On cross-examination the plaintiff's counsel asked Mr. Singletary if he had not been told in October, when he returned from Asheville, by Miss Addie May Graham both, that on the day in June when Mr. Harris had taken the letter to go next door to the phone, he returned the letter within a few minutes, on the same day, to Mr. Graham, and he replied that he had; and then the plaintiff's counsel asked Mr. Singletary if he had not known all the time, from October to 28 December, 1921, when he brought the action against Mr. Harris for stealing the letter, that Mr. Harris had brought the letter back to Mr. Graham within a few minutes after taking it to the phone. This was admitted by defendant.

Mr. Graham introduced the letter, which was from The Scott Register Company to Graham & Singletary. The letter was signed by W. F. Dunn, assistant manager, dated 2 June, 1921, in which it was stated that they were holding up shipment on a refrigerator as per instructions. Graham testified as to the matter as follows: "At the time we received this letter the firm of Graham & Singletary was dissolved. I know Mr. J. T. Harris, the plaintiff, and shortly after I received the letter he came to my store at 915 East Nash Street, Wilson, N. C. He asked me why I hadn't taken the refrigerator out of the depot. I told him because I didn't think I could handle it. I told him that the order had been canceled, and he said not. I told him it had, and I told him that I could show him that it had, and he said he didn't think so, so I got this letter, and was standing back of the counter and showed it to him, and while standing there talking to me some colored woman come in about something in the store, and I turned and walked down there, and he taken the letter and put it in his pocket and went out with the letter. He went to J. L. Matthews' old store, and as a result of something my daughter said, I went up to J. L. Matthews' store to look for Mr. Harris, and I told him I wanted to see him back to the store a few minutes, and he said all right, and I told him the business was that I wanted that letter. He said he didn't see what I wanted with it; that it wouldn't do me any good, but I said well it belonged to me. He hesitated, and I told him he would have to give it up before he left the store, and he threw it on the counter and said, 'take it,' but it wouldn't do me any good. At that time I think he said he would make Mr. Singletary smoke."

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant, W. P. Singletary, cause the arrest and prosecution of the plaintiff, J. T. Harris, as alleged? Answer: Yes.

"2. Was the same done without probable cause? Answer: Yes.

"3. Was the same done with malice? Answer: Yes.

"4. Has the criminal action terminated? Answer: Yes.

"5. What damages, if any, has plaintiff sustained thereby? Answer: $2,000."

Both parties proved by numerous witnesses their general reputations to be good.

There was a judgment on the verdict, and in the judgment was the following: "And have execution thereon against both the property and person of the defendant."

Numerous exceptions and assignments of error were taken by defendant and to the judgment as rendered, and appeal to the Supreme Court.

Other necessary facts will be set forth in the opinion.

Guion & Guion and E. M. Green for plaintiff.
Moore & Dunn for defendant.

CLARKSON, J. The defendant contended that the court below erred in allowing the justice of the peace to testify that defendant swore out a warrant against the plaintiff for the larceny of a paper-writing purporting to be a letter. The justice of the peace who tried the case testified that he had given the original warrant to the clerk of the Superior Court and without objection stated that the clerk said he did not know where it was; said it must have been destroyed as they moved to build a new courthouse, and that he could not locate it. That he had an exact copy on his docket. "It was my judgment on the warrant as well as on the docket." The witness was then asked to read the warrant as shown on his docket, which he did, as follows: "Upon the oath of W. P. Singletary set forth that J. T. Harris did on or about 5 June, 1921, did take, steal, conceal and carry away valuable papers, to wit, one letter, being an essential part of a certain contract, which letter was worth to the affiant the sum of $150."

To show a writing is lost or destroyed, in general terms, without showing a reasonable search or inquiry for it, has never been regarded as sufficient to admit secondary or parol evidence of its contents. The best evidence is the paper-writing, when a matter is required to be put in writing, or the paper-writing is in issue or the subject of the controversy. *McKesson v. Smart,* 108 N. C., p. 17; *Avery v. Stewart,* 134 N. C., p. 287; *Sermons v. Allen,* 184 N. C., p. 127; *Chair Co. v. Crawford, ante,* 531. The exception to the rule is where the contents of the writing is collateral to the controversy or issue. *Herring v. Ipock,* 187 N. C., p. 459.

In the present case the clerk was not introduced as a witness as he should have been. His evidence was hearsay, but no objection was made. The justice of the peace said that it was his judgment on the warrant as well as on the docket. Justices of the peace are required to keep dockets, latter part C. S., 1482, "in which shall be entered a minute of every proceeding had in any action before such justice." It is said in a number of cases that a justice of the peace's court is not a court of record, but under the statute a record is kept. *The defendant in his testimony admitted* that he had sworn out a warrant against plaintiff for stealing the letter. If error, it was not prejudicial. The serious contention of defendant is to the following answer of the justice of the peace, Hardy, who tried the case: "My judgment was that the suit was brought frivolous and malicious, and I taxed Mr. Singletary with the costs and dismissed the case as to Mr. Harris." The defendant asked the court to strike out the answer as to be frivolous and malicious, which was refused and exception taken.

The witness further stated, to which there was no objection: "The case was dismissed by me and affiant taxed with the cost from which affiant appealed, and that is why the papers were handed over to the clerk of the court this, 10 January, 1922. It was withdrawn 24 January, 1922, when he paid the costs and I mailed the sheriff here a check for his arrest—'check to different officers for handling papers on 25 January, 1922.' "

We think the evidence would have been incompetent under *Holton v. Lee,* 173 N. C., p. 105, if the testimony had not shown that Singletary paid the costs. This was admitted by Singletary.

C. S., 1288, is as follows: "The party convicted in a criminal action or proceeding before a justice shall always be adjudged to pay the costs; if the party charged be acquitted, the complainant shall be adjudged to pay the costs, and may be imprisoned for the nonpayment thereof, if the justice shall adjudge *that the prosecution was frivolous or malicious.* But in no action or proceeding of which he has final jurisdiction, commenced or tried in a court of a justice of the peace, shall the county be liable to pay any costs." It is well settled, in fact, the statute so says that complainant prosecutor shall be adjudged to pay the cost and imprisoned for nonpayment thereof if the court finds the prosecution frivolous or malicious.

An appeal lies from the judgment of a justice of the peace in a criminal action taxing the prosecutor with the cost. *S. v. Morgan,* 120 N. C., p. 563.

In *Holton v. Lee,* 173 N. C., at p. 107, it was held: "It was necessary to show malice, as it was one of the material elements of the cause of action. 'The burden of showing that the prosecution complained of was instituted maliciously and without probable or reasonable cause is, as we have seen, upon the plaintiff, and both of these elements must concur or the suit will fail; for if the prosecution were malicious and unfounded in matter of fact, but yet there was probable cause, the action for malicious prosecution cannot be maintained. Newell on Malicious Prosecution (1892), p. 473, sec. 12; *Stanford v. Grocery Co.,* 143 N. C., 419; *Downing v. Stone,* 152 N. C., 525; *Motsinger v. Sink,* 168 N. C., 548. Before punitive damages can be recovered express or particular malice must be shown. *Stanford v. Grocery Co.,* and the other cases above cited."

The presumption is that one knows the law. Singletary could not be imprisoned for nonpayment of cost unless the finding of the justice of the peace was "frivolous or malicious." The justice of the peace found both it was "*frivolous* and *malicious,*" from which Singletary appealed and afterwards withdrew the appeal and paid the cost. This was a circumstance and competent on the ingredient of malice in this action.

In *Downing v. Stone,* 152 N. C., at p. 527, speaking to the subject: "In Hale on Torts, 354, treating of malicious prosecution, it is said: 'Malice, as here used, is not necessarily synonymous with anger, wrath or vindictiveness. Any such ill-feeling may constitute malice. But it may be no more than the opposite of *bona fides.* Any prosecution carried on knowingly, wantonly, or obstinately, or merely for the vexation of the person prosecuted, is malicious. Every improper or sinister motive constitutes malice in this sense. The plaintiff is not required to prove express malice in the popular sense. The test is, was the defendant actuated by any indirect motive in preferring the charge or commencing the action against the plaintiff.' "

The issues submitted in the present case were similar to those in the *Downing case, supra,* as shown by the issues. In that case the justice of the peace had final jurisdiction and the court admitted the docket and judgment of the justice of the peace who tried and disposed of the case (1) to show on the issue that the action had terminated; (2) on the issue of probable cause. The Court, at p. 530, said: "It is well established with us that when a *committing magistrate,* as such, examines a criminal case and discharges the accused, his action makes out a prima facie case of *want of probable cause,* that is the issue directly made in the investigation; but no such effect is allowed to a verdict and judgment of acquittal by a *court having jurisdiction* to try and determine the question of defendant's guilt or innocence, and the weight of authority is to the effect that such action of the trial court should not be considered as evidence on the issue as to probable cause or malice. In this case the justice had final jurisdiction to try and determine the question. The judgment is necessarily admitted, because the plaintiff is required to show that the action has terminated, but it should be restricted to that purpose, and the failure to do this constitutes reversible error," citing cases. (Italics ours.)

In the case at bar the justice of the peace had only to determine *probable cause;* he had no final jurisdiction. In the *Holton case, supra,* the Court, although the justice of the peace had no final jurisdiction, it was held the evidence incompetent to prove malice. We think on this record the withdrawal of the appeal by defendant on the *frivolous and malicious* finding was a circumstance to be submitted, with other evidence as to malice. The probative force was for the jury.

From a careful review of the charge, we think it practically follows the law as laid down in the *Downing case, supra,* and the other assignments of error are immaterial on the record.

In *Swain v. Oakey,* 190 N. C., at p. 116, it is said: "We do not think defendant could be arrested unless it is shown in using the words spoken he did so with actual malice. There is no issue of actual malice presented by the record. In actions of this kind, after verdict and judgment to arrest the defendant, it should appear affirmatively that the slander—the words spoken—were done with actual malice and an issue submitted to the jury. This does not appear to have been done from the record. *Ledford v. Emerson,* 143 N. C., p. 527; *Oakley v. Lasater,* 172 N. C., 96; *Coble v. Medley,* 186 N. C., p. 479, and cases cited. In *Elmore v. R. R.,* 189 N. C., p. 674, we said: 'There was no separate issue as to punitive damages, and on the record there is no way to ascertain if any of the damages awarded plaintiff were punitive.' "

So much of the judgment that plaintiff have execution against the defendant, as to the person, cannot be sustained.

The judgment in conformity with this opinion is

Modified and affirmed.

JOHN R. JONES, JR., AND L. P. WILKINS, AND ALL OTHER CREDITORS WHO MAY JOIN HEREIN, AND CONTRIBUTE TO THE COSTS OF THIS ACTION, v. ATLANTIC AND WESTERN RAILROAD COMPANY.

(Filed 20 April, 1927.)

1. **Corporations—Bonds—Mortgages—Trusts—Deeds and Conveyances—Foreclosure—Sales—Contracts—Stipulations.**

Where a railroad corporation conveys its property, and income in trust for the purpose of securing the payment of coupon bonds to be issued and generally sold for the equal protection of all purchasers, a provision in the deed of trust to the effect that upon default in the payment of the interest, etc., the trustee shall have the power to foreclose upon request of the holders of a certain part of the par value of the bonds, is for the benefit of all such holders, and those who held such proportionate part are bound by the valid provision of their contract, and without complying therewith a permanent receiver may not be appointed by the court under the provisions of C. S., 1185, in their direct suit for the purpose, though the corporation itself may be insolvent.

2. **Pleadings—Prayer for Relief—Courts—Interpretation—Foreclosure.**

The prayer of the complaint for the relief sought is not determinative thereof, but ultimately dependent upon the legal effect of the matters alleged in the pleadings to be interpreted by the court.

3. **Mortgages—Foreclosure—Sales—Trusts—Courts—Contracts.**

While ordinarily a mortgagee may either foreclose the mortgage in conformity with its terms or apply to the court for foreclosure, the latter course is not available if contrary to a valid stipulation clearly expressed in the instrument.

APPEAL from order of *Cranmer, J.*, at chambers, dated 16 December, 1926, signed at Smithfield, N. C. Reversed.

Action to recover judgment upon bonds issued by defendant and held by plaintiffs; for the appointment of a receiver for defendant corporation, to the end that its affairs may be wound up and its assets equitably distributed amongst the persons entitled thereto; and for the sale of property described in the deed of trust executed by defendant to secure payment of said bonds and of other bonds described therein, and the application of the proceeds of said sale to the payment of defendant's indebtedness in accordance with the rights of the parties hereto.

From order appointing a permanent receiver for defendant, and authorizing, empowering, and directing said receiver to take possession of all its property, and to continue the operation of its railroad, defendant appealed to the Supreme Court.

Seawell & McPherson for plaintiffs.
Hoyle & Hoyle for defendant.

CONNOR, J. The defendant herein is a corporation, organized under the laws of the State of North Carolina, and engaged in the operation of a railroad, as a common carrier, for the transportation of passengers and freight. Its railroad extends from the town of Sanford, in Lee County, to the town of Lillington, in Harnett County, a distance of twenty-five miles.

On 5 June, 1912, the defendant corporation, by deed of trust which has been duly recorded, conveyed to the Fidelity Trust Company, a Maryland corporation, the following described property:

"All the railroad of the Atlantic and Western Railroad Company, beginning at the town of Sanford, North Carolina, in the county of Lee, and running thence eastwardly in the direction of Newton, North Carolina, through the counties of Lee, Moore, Harnett, Wayne, Johnston, Sampson, Montgomery, Stanly, Cabarrus, Lenoir, and Catawba, and all extensions thereto and branches thereof, and all physical property of every description connected therewith, or with the use and occupation thereof, and all other real estate and tangible property now owned or hereafter to be constructed or acquired by the said railroad company in the State of North Carolina, or elsewhere;

"And all of the rights of way and land now or hereafter to be accepted and used in connection with, or for the construction, completion, and maintenance of said railroad, or its extensions and branches, and all of its rails, bridges, culverts, sidetracks, depot grounds, stations, machine shops, buildings and other structures, locomotives, engines, tenders, cars and other rolling stock and equipment of every kind; and all machinery, wood, coal, fuel, oil, or other supplies now owned or hereafter acquired by said railroad;

"And all the rights, powers, privileges, immunities, and franchises owned by, connected with, or hereafter to be acquired by or connected with said railroad, its branches or extensions, and all grants, leaseholds, leases, terms, trackage, or other agreements, contracts, easements, tenements, hereditaments, and appurtenances now or hereafter held by or appertaining to said railroad, or its branches or extensions; and all tolls, rents, issues, profits, and any and all income of any and all of said property, rights and franchises covered by or included in the terms of this mortgage; and all real property and tangible personal property of every name and nature, and any and all rights, franchises, privileges, immunities, and appurtenances which from time to time hereafter may be expressly conveyed, granted, transferred, assigned, mortgaged, or delivered and pledged by the railroad, or by any person or corporation in its behalf, and with its written consent or approval, to the trustee hereunder as additional security for the bonds secured by this mortgage."

The above-described property was conveyed to the trustee named in said deed of trust "for the following uses and purposes, and no other, that is to say, for the equal and proportionate benefit and security, subject to the terms, conditions, and provisions hereinafter set forth, of all the present and future holders and owners of the bonds, or interest coupons hereunto belonging, issued and to be issued under and secured by this indenture, etc."

Pursuant to the provisions of said deed of trust, defendant has issued its bonds in the sum of $332,000, which are now outstanding. Each of said bonds is due and payable on 1 May, 1952, with interest thereon at 5 per cent per annum, payable semiannually on 1 November and 1 May of each year, according to the terms of coupons attached thereto. It is provided on the face of each bond that "this bond is one of a series of coupon bonds of the Atlantic and Western Railroad Company, known as the Atlantic and Western Railroad Company First Mortgage Five Per Cent Forty-Year Gold Bonds, issued and to be issued to an amount not exceeding $1,500,000 in the aggregate, under and in pursuance of and all equally secured by a mortgage or deed of trust dated May, 1912, duly executed by the Atlantic and Western Railroad Company to the Fidelity Trust Company (Baltimore, Maryland), a corporation of the State of Maryland, as trustee, and covering the property and franchises in said mortgage or deed of trust, to which reference is hereby made for a description of said property and franchises, and for a specification of the nature and extent of the security of the rights of the holders or owners of the bonds of said series, and of the terms and conditions under which the same are issued, or to be issued, and to be issued subject to the provisions of the said mortgage or deed of trust, to which provisions any and every person taking, holding, or claiming an interest in this bond, or in any of the coupons hereto attached, shall be deemed to have assented."

Plaintiffs John R. Jones, Jr., and L. P. Wilkins are the holders and owners of bonds of the par value of $140,000, included in the issue of $332,000. All of these bonds are held and owned subject to the provisions, terms, and conditions of the deed of trust by which they are secured. No part of the interest on any of said bonds, including the bonds held and owned by plaintiffs, has been paid since 1 November, 1917. Interest on each and all of said bonds since said date is now due, in accordance with the terms and conditions set out in the coupons attached to each of said bonds. There is no provision in said bonds, or in the coupons attached thereto, by which the maturity of the bonds, due according to their tenor, on 1 May, 1952, is accelerated, upon failure of defendant to pay the interest coupons as they shall become due. There is, however, in the deed of trust a clause in words as follows:

"When trustee shall declare principal due. But in the event that default shall be made in the payment of any interest coupon, or any bond issued hereunder, and such default shall have continued for a period of 90 days; or in the event default shall be made in the due and punctual payment of the principal of any bond issued and secured under this indenture, and then outstanding, when and as the same shall have become due, or shall have been declared due and payable, or in the event of default in the due observance or performance of any other covenant, condition, or agreement herein required to be kept or performed by the railroad, and such default shall have continued for a period of 90 days after due service upon the president of the railroad of written notice thereof from the trustee, or from the holders of at least 25 per cent in principal amount of all bonds issued and secured by this indenture and then outstanding, specifying such default and requiring same to be remedied; or in the event that an order shall be made by a court of competent jurisdiction appointing a receiver of the railroad, or if its property and franchises, or for the liquidation of its affairs or business; then, and in each and every case, the trustee may, and upon the written request of the holders of a majority in amount of all the bonds issued and secured hereunder and then outstanding, and upon being furnished reasonable security and indemnity against all costs, expenses, and liabilities to be by it incurred, the trustee shall by notice in writing delivered to the president, secretary, or treasurer of the railroad, declare the principal of all bonds issued hereunder and then outstanding to be due and payable forthwith and immediately; and upon such declaration such principal shall thereby be and become forthwith and immediately due and payable, anything contained in this indenture, or in said bonds or coupons to the contrary notwithstanding. But if at any time after such declaration and before any sale of the mortgaged premises shall have been made, all arrears of interest, with interest at the rate of 5 per cent on overdue installments thereof, and all other amounts (except the principal of the bonds with respect to which the railroad shall then be in default), together with the reasonable charges and expenses of the trustee, its agent and attorneys, shall be paid by the railroad, or collected by the trustee out of the mortgaged premises; then and in such cases the holders of a majority in amount of the bonds secured hereby and then outstanding may by written notices to the railroad and the trustee waive such default and its consequences; and thereupon the date for the payment of the principal of said bonds shall be restored to what it was prior to such declaration by the trustee."

This action was begun on 8 December, 1926, by plaintiffs, as holders and owners of bonds issued by defendant as aforesaid, in behalf of themselves and of all other creditors of defendant, who may join herein and contribute to the costs of the action. It came on for hearing before the judge of the Superior Court, holding the courts of the Fourth Judicial District, at Smithfield, N. C., on 16 December, 1926, upon an order theretofore entered herein, dated 8 December, 1926, requiring defendant to appear and then and there show cause why a receiver should not be appointed for defendant to the end that its affairs may be wound up and its assets distributed to those who by law are entitled thereto. At the time of the entry of said order to show cause why a permanent receiver should not be appointed, upon the application of plaintiffs, a temporary receiver for defendant was appointed, with power and authority to assume immediate custody and control of all the property of the defendant company, including its physical and intangible properties, road bed, rolling stock, equipment, evidence of indebtedness, choses in action, franchises, and all property whatsoever. The said temporary receiver was authorized and directed by the court to operate defendant's railroad as a going concern, assuming with respect thereto all of the rights, powers, and duties necessary for the carrying out of the order of the court. Pursuant to said order, and after full compliance by him with its terms, the said temporary receiver took possession of defendant's railroad and other property, and began and continued to operate said railroad until the hearing on 16 December, 1926.

Neither the Atlantic and Western Railroad Company, defendant herein, nor the Fidelity Trust Company, the trustee to whom defendant had conveyed by the deed of trust all its property to secure the bonds issued by defendant, including the bonds held and owned by plaintiffs, had any notice, prior to the commencement of this action, that plaintiffs had become the owners of said bonds; no request had been made by plaintiffs, or by anyone for them, of the trustee to declare said bonds due and payable, forthwith and immediately, because of default in the payment of the interest coupons attached to said bonds.

At the hearing at Smithfield, N. C., on 16 December, 1926, defendant appeared in response to the order to show cause why a permanent receiver should not be appointed, and having introduced in evidence the deed of trust from the Atlantic and Western Railroad Company to the Fidelity Trust Company, moved the court that the temporary receivership be dissolved; that no permanent receiver be appointed, and that the action be dismissed, for that plaintiffs had not complied with the terms and conditions of the deed of trust under which the bonds held by them were issued, contending that plaintiffs could not maintain this action without showing that they had first complied with these terms and conditions. The court denied defendant's motion, holding that plaintiffs, in behalf of themselves and other creditors, had a right to bring this action under the statute, C. S., 1185, and that the action not being necessarily for the foreclosure of the deed of trust, plaintiffs were not required, in order to maintain the same, to show that they had, prior to its commencement, complied with the provisions of the deed of trust, made therein conditions precedent to a right of action for the foreclosure of the same.

The court thereupon found from the evidence that defendant corporation is insolvent, and that it was necessary for the preservation of its property and assets that a receiver be appointed therefor, to the end that the affairs of the corporation be wound up, or that such further disposition of the matter be made, as may hereafter, pending the action, appear to the court to be proper. Upon said findings by the court, it was ordered that the receivership be made permanent, and that the permanent receiver therein appointed be authorized, empowered, and directed to take into his possession and to assume full custody and control of all the property of defendant corporation; the said permanent receiver was further authorized, empowered, and directed to continue the operation of defendant's railroad, as the same has been heretofore operated by defendant.

The nature of this action, whether it is an action for the dissolution of the defendant corporation or an action for the foreclosure of the deed of trust by which the bonds held by plaintiffs are secured, will be determined, first, by the relief prayed for by plaintiffs, and, second, if upon the facts alleged in the complaint they are not entitled to all the relief prayed for, then by such relief as they are entitled to recover upon said facts. The prayer of his complaint is not the measure of the relief which a plaintiff may recover in this action. It does not narrow the relief which may be recovered, nor does it enlarge such relief. A plaintiff may recover any relief to which he is entitled upon the facts alleged in his complaint and established by his proof. His recovery, however, is limited by such facts. Therefore, the nature of his action must be determined ultimately by the relief to which he is entitled upon the allegations of his complaint. *Shrago v. Gulley,* 174 N. C., 135; *Warren v. Herrington,* 171 N. C., 165; *Baber v. Hanie,* 163 N. C., 588; *Councill v. Bailey,* 154 N. C., 54. In the last cited case, it was held that "when it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of an action for the foreclosure of a mortgage, and is removable to the county in which the land is situated." Cited and approved in *Warren v. Herrington, supra.*

In the instant case, plaintiffs seek to recover judgment upon bonds issued by defendant and held by them; they pray that the property conveyed by the deed of trust, executed by defendant to secure these and other bonds described therein, be sold, and that the proceeds of said sale be applied to the payment of all said bonds pro rata, in accordance with the provisions of the deed of trust. In the absence of matters of defense, plaintiffs are entitled to this relief by an action to foreclose the deed of trust; this remedy is concurrent with and in addition to the right of plaintiffs to have the property sold by the trustee under the power of sale contained in the deed of trust. Ordinarily, a creditor, whose debt is secured by a mortgage or deed of trust, in which a power of sale is conferred upon the mortgagee or trustee, upon default by his debtor, as provided in the mortgage or deed of trust, has a choice of remedies—he may invoke the exercise of the power of sale, or he may bring an action to foreclose the mortgage or deed of trust. If his debtor is a corporation, which has conveyed all its property by deed of trust to secure his debt, as well as the debts of other creditors, and all of the creditors secured thereby have assented to a provision in the deed of trust that no one of said creditors shall have the right to institute any action at law or suit in equity to enforce the security held by him under said deed of trust, may he, notwithstanding such provision, maintain an action for the dissolution of the corporation by means of a receivership in which he prays that the property described in the deed of trust be sold, under the orders of the court, and that the proceeds of said sale be applied to the payment of said secured debts in accordance with the provisions of the deed of trust?

The deed of trust from the Atlantic and Western Railroad Company to the Fidelity Trust Company, by which plaintiffs' bonds are secured, contains a provision in the following words: "No holder of any bond or coupon issued hereunder or secured hereby shall have any right to institute any action at law or suit in equity for the foreclosure of this indenture, or for the execution of any trusts hereunder, or for the appointment of a receiver, or for the protection of the mortgaged premises, or for the enforcement of any covenant of this indenture, or for any other remedy under this indenture, either at law or in equity."

Plaintiffs, when they became holders and owners of bonds issued under the deed of trust, and secured thereby, expressly assented to the foregoing provision. In *Grant v. Winona and S. W. Ry. Co.* (Minn.), 89 N. W., 60, it is said: "Where such a railway bond contains a clear statement that it is one of a series of bonds secured by a mortgage to a trustee upon the property of the railway, every proposed purchaser is thereby advised that if he buys he will be brought into contract relations with his coholders, and that his absolute rights in respect to the foreclosure of the mortgage, or the collection thereby of the principal or interest on his bond, are limited by the provisions of the trust deed and the peculiar nature of the security. *Guilford v. Railway Co.,* 48 Minn., 560, 51 N. W., 658, 31 Am. St. Rep., 694." The purpose of the provision is manifest—it is for the protection, not only of defendant and of the trustee, but also of other bond-holders who rely upon the deed of trust as security for their bonds. Adequate provisions are made in the deed of trust for the protection of each bond-holder secured thereby, by the trustee who holds the property conveyed to him by the deed of trust "for the equal and proportionate benefit and security, subject to the terms, conditions, and provisions hereinafter set forth, of all present and future holders and owners of the bonds or interest coupons hereunto belonging, issued or to be issued under and secured by this indenture." The provision is valid, and in the absence of an allegation that the trustee has failed or refused, or has neglected to perform his duties, imposed by the deed of trust, is binding upon plaintiffs and all other holders and owners of bonds issued under and secured by the deed of trust. In *Cochran v. Pittsburg, S. and N. R. Co.,* 150 Fed., 682, *Hazel, District Judge,* says: "The mortgage *inter alia* provides that bond-holders shall not have the right to foreclose the mortgage for default of any of its conditions, unless a majority in amount of the holders of bonds outstanding have requested in writing of the trustee that a foreclosure be brought in the name of the trustee and security for costs and liabilities be offered; such notification and indemnification in terms being made a condition precedent to foreclosure. The demurrants contend that the bill does not disclose a proper request to bring this action. Authorities abound that a provision contained in a mortgage such as mentioned in the bill is purely contractual, and ordinarily must be strictly complied with before a bond-holder feeling himself aggrieved can enforce his remedy."

In *Muren v. Southern Coal and Mining Co.* (St. Louis Ct. of Ap., Mo.), 160 S. W., 835, it is said: "It is the policy of the law to sustain the validity of such reasonable provisions inserted in a mortgage deed, securing an issue of bonds which are designed to pass into the hands of separate individual holders for the better security of all, as such security should not be impaired by the conduct of one or a few. . . . In other words, such stipulations contained in the mortgage are not viewed as tending to oust the courts of jurisdiction in the premises, but rather as wholesome restrictions imposed for the better security of all concerned. Therefore, when such provisions are inserted in the mortgage, and the provisions of the mortgage are aptly referred to in the bonds, as here, in plain and unambiguous terms, the courts universally give them effect as a proper means of protecting the security for the benefit of the entire series of bonds. See *Guilford v. Minn.. etc., R. Co.,* 48 Minn., 560, 51 N. W., 658, 31 Am. St. Rep., 694; *Boley v. Lake St., etc., R. Co.,* 64

Ill. App., 305; *Siebert v. Minn., etc., R. Co.,* 52 Minn., 148, 53 N. W., 1134, 20 L. R. A., 535, 38 Am. St. Rep., 530; Jones on Corporate Bonds, etc. (3 ed.), sec. 340a; *Belleville Savings Bank v. So. Coal Co.,* 173 Ill. App., 250." In *Siebert v. Minn. etc., R. Co., supra,* it is said: "We are unable to see why the bond-holders, subject to reasonable limitations, may not be bound by stipulations in the mortgage of this character, waiving a default, and providing, subject to the conditions named, for the foreclosure by the trustee exclusively. The interests of the bond-holders as a class, and the nature of the security, are to be considered. 'They are agreements which the bond-holders are at liberty to make, and there is nothing illegal or contrary to public policy in them.' *Chicago D. and W. R. Co. v. Fosdick,* 106 U. S., 47, 27 L. Ed., 47. Each bond-holder enters into contract relations with each and all of his cobond-holders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified, not only by the express provisions of the mortgage, but by the peculiar nature of the security."

Plaintiffs' right to institute and maintain this action, whether it is an action for the dissolution of defendant corporation or an action for the foreclosure of the deed of trust, is restricted by provisions in the deed of trust; these provisions are designed for the protection of the holders of all the bonds secured in said deed, and, being reasonable, are valid; plaintiffs, having failed to comply with these reasonable and valid restrictions, are not entitled to the relief which they seek in this action. We find nothing in *Lasley v. Scales,* 179 N. C., 578, or in *Banks v. Mfg. Co.,* 176 N. C., 318, requiring a conclusion to the contrary. In *Banks v. Mfg. Co., supra,* plaintiff was the owner of all the bonds secured by the mortgage, and it is held that the restrictive provisions in the mortgage were therefore of no force. In *Lasley v. Scales, supra,* a receiver had been appointed, and the controversy was between the trustee in the deed of trust and the receiver appointed by the court with respect to the right to sell the property conveyed in the deed of trust. In neither case is the question herein presented decided.

It appears from the complaint that defendant has conveyed all its property to the trustee, by the deed of trust; defendant has no assets available for the payment of its bonds which are not covered by and subject to the deed of trust. Plaintiffs, therefore, can recover no relief by an action for the dissolution of defendant corporation which it is not entitled to under the deed of trust. They have no interest in defendant, or in its property, except as holders and owners of its bonds, secured by the deed of trust. Upon default in the payment of said bonds, or of the interest coupons attached thereto, as provided in the deed of trust, plaintiffs are entitled to have their pro rata share of the property conveyed in the deed of trust to secure said bonds applied to their payment. Their remedy under the deed of trust is adequate. Having agreed to rely upon this remedy only for the enforcement of their rights as holders of the bonds, they must be content therewith. It is to be presumed that they seek only the relief to which they are entitled; it will be presumed that they have no ulterior purpose with respect to defendant or its property.

There was error in appointing a receiver for defendant in this action. The action should be dismissed; it is remanded to the Superior Court of Lee County for that purpose. The order is

Reversed.

SALLIE S. STRICKLAND ET AL. v. R. N. SHEARON ET AL.

(Filed 20 April, 1927.)

1. **Judgments—Estoppel—Deeds and Conveyances—Reformation of Instruments—Equity.**

Where a deed to timber standing on land is sought to be reformed for conveying more timber, through the mutual mistake of the parties, than was intended, a judgment that the description was in accordance with the intent of the parties, estops the grantor from again setting up his equity both against his grantee and his purchaser under a deed with the same description of the lands conveyed.

2. **Appeal and Error—Judgments—Excusable Neglect—Findings of Fact.**

Upon motion of defendant to set aside a judgment for surprise, excusable neglect, etc., a finding by the Superior Court judge that the movant had not been made a party to the action, upon sufficient evidence, is binding upon him when he has not excepted or appealed.

3. **Judgments—Estoppel—Deeds and Conveyances—Appeal and Error—Parties.**

Where injunctive relief is sought against the cutting and removing of timber growing upon lands upon the ground that more timber had been conveyed by mutual mistake of the parties than was intended, and the plaintiff is estopped by judgment from again setting up his equity, the grantee of the defendant under a deed with the same description of the lands upon which the timber was standing has the title to the timber thus conveyed, though he had not been made a party thereto.

4. **Judgments—Default and Inquiry—Appeal and Error.**

A judgment by default and inquiry establishes only the cause of action alleged in the complaint, and where the equitable relief of reformation of a deed to standing timber upon lands is therein sought, on the ground of mutual mistake of the parties, and judgment is entered against the plaintiff, the basis upon which he has sought damages for the trespass having failed, an inquiry by the court as to the amount is improvidently entered.

MOTION to set aside a judgment of default and inquiry upon the ground of irregularity and excusable neglect. The pertinent facts appear in the opinion of the Court.

B. T. Holden and W. H. Yarborough for plaintiff Strickland.
G. M. Beam for defendant Shearon.

BROGDEN, J. On 24 January, 1925, Sallie Strickland and her children instituted an action against W. H. Fuller, B. S. Alford, and R. N. Shearon in the Superior Court of Franklin County. The complaint alleged, in substance, that the plaintiff had instituted a special proceeding to sell the timber in controversy to the defendants Alford and Fuller. Said special proceeding was duly conducted, and E. H. Malone was appointed commissioner to make the sale, and said commissioner, pursuant to power conferred, executed and delivered a deed for said timber to the defendants Alford and Fuller. Plaintiff alleged that certain timber was included in the petition filed in the special proceeding and in the deed from Malone, commissioner, to said defendant through mutual mistake of the parties, or by mistake of the draftsman. The plaintiff further alleged that Fuller and Alford had conveyed the timber to the defendant Shearon, and that said defendant, at the time he took the conveyance for the timber, "had notice and knowledge of the mistake which had been made, and his attempt to cut and destroy the valuable young growth of timber upon the lands is in violation of the rights of the plaintiffs and of the well understood contract and agreement of the parties, and an unwarranted trespass upon their property." Plaintiff further alleged damages for the "wrongful trespass, cutting, and removing the timber without authority, as hereinbefore alleged, in the sum of at least eight hundred dollars.

The plaintiff applied for and secured an order restraining the defendant from cutting said timber pending the hearing. The cause was tried at the August Term, 1925, and the issues and answers of the jury thereto were as follows:

"1. Was the true agreement between Mrs. Sallie S. Strickland and the defendants Alford and Fuller that there was being sold only the timbers within the pasture and four or five acres of old timber outside and adjoining the timber within the pasture? Answer: 'Yes.'

"2. Was there any mutual mistake of the parties, or the mistake of the draftsman, included in the petition, order, and commissioner's deed, other timbers not intended to be sold or to be included in said petition, order, and deed? Answer: 'Yes.'"

It will be observed that there was no issue tendered as to damages.

Upon the verdict, the following judgment was rendered:

"This cause coming on to be heard at this August Term, 1925, of Franklin Superior Court, before Honorable Garland E. Midyette, judge presiding, and a jury:

"It is made to appear to the court that summons was issued on 24 January, 1925, returnable on 9 February, 1925, and personally served by the sheriff of Franklin County, upon all the defendants on 26 January, 1925, by reading and delivering a copy of summons and complaint to each of them; and it further appearing that complaint herein was duly filed in the office of the clerk of the Superior Court of Franklin County, N. C., on 24 January, 1925, and a copy thereof duly served upon each of the defendants by the sheriff of Franklin County, on 26 January, 1925; and it further appearing that the defendant R. N. Shearon failed to appear and answer or demur to said complaint within twenty days after the service thereof upon him, or at any time since.

"It is therefore by the court ordered, considered, and adjudged that the plaintiffs are entitled to judgment by default and inquiry against the said R. N. Shearon, and that as to him all the allegations of the complaint are adjudged and decreed to be true, except as to the amount of damages alleged to have been sustained by reason of his unlawful trespass and cutting; and it is ordered that a writ of inquiry issue as to them, in accordance with the practice and provisions of the statutes, said inquiry to be executed at the next civil term of Franklin Superior Court. The defendants W. H. Fuller and B. S. Alford having answered, the following issues were submitted to the jury. (See issues and verdict above.)

"And it further appearing to the court from the evidence that the sum of $850 was a wholly unfair and inadequate price for the timbers as described in the petition, orders, and deed referred to in the pleadings, and that the conveyance and sale of all of said timbers was and would be highly injurious to the interest of the infant plaintiffs in this action, on whose behalf the petition in said *ex parte* proceeding was filed. Now, upon the coming in of the verdict, it is by the court considered, ordered, and adjudged and decreed that the original petition filed before the clerk of the Superior Court of Franklin County in the *ex parte* proceedings referred to in the pleadings, and all orders and decrees made in response and pursuance of said petition and the deed executed by E. H. Malone, commissioner, to the defendants Fuller and Alford, referred to in the pleadings, be and they are hereby so reformed, corrected, and amended so as to authorize and convey only such timbers and trees of the dimensions set out in the commissioner's deed as were and are situate upon the lands contended for by the plaintiffs in their complaint, to wit: 'The timbers in the pasture and four or five acres of old timber outside of and adjoining the timbers within the pasture, together with such easements as are described by the commissioner's deed for the purpose of cutting and removing the same.' It is further ordered that the injunction heretofore granted in this case be made permanent. It is further ordered, adjudged, and decreed that plaintiffs recover of the defendants the costs of this action, to be taxed by the clerk."

From the judgment rendered, the defendants Fuller and Alford appealed to the Supreme Court.

The defendant Shearon did not except to the said judgment or finding of fact therein as to his failure to file an answer, nor did he appeal. The cause was argued in the Supreme Court, and the opinion of the Court was delivered by *Justice Connor,* and is reported in 191 N. C., p. 560. When the opinion of the Supreme Court was certified to the Superior Court, the defendant Shearon made a motion to set aside the judgment rendered by Judge Midyette at the trial of the cause, upon the ground that the judgment was irregular, and upon the further ground of excusable neglect, and also that the restraining order against the defendant Shearon be dissolved, to the end that he could proceed with the cutting of the timber.

The motion was heard before W. M. Bond, judge presiding, at the November Term, 1926, and the following judgment rendered:

"This cause coming on to be heard at this November Term, 1926, Superior Court of Franklin County, and being heard at said term by consent of all parties, upon the motion of R. N. Shearon to set aside judgment by default and inquiry rendered in this cause at the August Term, 1925, and it being agreed the entire record in the cause, including the case on appeal to the Supreme Court, should be taken and considered as a part of R. N. Shearon's petition and affidavit, and the plaintiff having demurred to said petition upon the grounds that the same did not state a cause of action in favor of the petitioner, for that it did not appear that said petitioner had excepted to or appealed from said judgment, although it is alleged in said petition that said petitioner was present at the trial, and was duly represented by counsel, and upon the further grounds that it is alleged in said petition that petitioner relied upon his codefendants Fuller's and Alford's promise that they would defend the title and reimburse him for any loss he might sustain.

The court, upon the consideration of petition, record, and the demurrer of the plaintiffs, is of the opinion that the remedy for petitioner, if any, was by exceptions duly noted to and appealed from the judgment rendered at the August Term, 1925, of the Superior Court of Franklin County, and the demurrer of the plaintiff is therefore sustained and the motion of the petitioner Shearon to set aside judgment is denied."

From the foregoing judgment, the defendant Shearon appealed to this Court.

In *Strickland v. Shearon,* 191 N. C., 560, the Court held that there was no evidence of mutual mistake, as alleged by the plaintiff. *Connor, J.,* delivering the opinion, said: "There is no evidence that the defendants understood that the description given to the attorney in their presence and acquiesced in by both Mrs. Strickland and themselves, was limited as contended by plaintiffs. When parties to a contract have expressed their agreement in terms that are explicit and plain of meaning—that is, when their minds have met on the terms of the contract—it may not be revoked or altered by reason of the mistake of one of the parties alone, resting wholly in his own mind, there being no fraud or misrepresentation by the other. We must hold that it was error to refuse defendant's motion for judgment as of nonsuit."

The legal effect of this decision was to declare that, as the special proceeding was properly conducted and no mistake had been made in the description of the timber conveyed therein, Fuller and Alford were the owners of the timber by virtue of the deed from Malone, commissioner, as described in said deed.

The plaintiffs alleged that the timber had been sold by Fuller and Alford to the defendant Shearon, and that Shearon had notice of the mistake at the time of his purchase. There is no proof that Fuller and Alford sold any timber to Shearon, except such timber as was covered by and described in the deed received by them from Malone, commissioner. It is, therefore, clear that the opinion of the Supreme Court in *Strickland v. Shearon, supra,* constitutes an estoppel upon the plaintiffs to assert any claim to said timber. *Finch v. Finch,* 131 N. C., 271; *Burns v. Stewart,* 162 N. C., 360; *LeRoy v. Steamboat Co.,* 165 N. C., 109; *Shuford v. Brady,* 169 N. C., 224. The rule is thus declared by *Walker, J.,* in *Price v. Edwards,* 178 N. C., 493: "Estoppel by judgment is a bar which precludes parties to an action to relitigate, after final judgment, the same cause of action or ground of defense, or any fact determined by the judgment." *Hardison v. Everett,* 192 N. C., 371.

So that, under the former decision in this case, the plaintiff neither has nor can assert any title to the timber covered by the deed. It necessarily follows that the defendant Shearon would have the right to cut the timber covered by the deed except for the fact that the injunction was made permanent, and for the further fact that Midyette, J., in the judgment of August Term, 1925, found as a fact that the defendant Shearon had "failed to appear and answer or demur to said complaint within twenty days after the service thereof upon him, or at any time since," and upon such finding, entered the judgment by default and inquiry. The defendant Shearon was a witness at the trial in the Superior Court, and was informed at the trial that he had failed to file an answer. He did not except to the judgment by default and inquiry so rendered, nor did he appeal therefrom. The answer filed by Alford and Fuller may or may not have included the defendant Shearon. The answer states: "The defendants, answering the complaint of the plaintiff filed herein, say," etc. The case on appeal to the Supreme Court in *Strickland v. Shearon, supra,* however, was signed by William H. Ruffin and W. M. Person, attorneys for defendants "Fuller and Alford" only. When Judge Midyette rendered the judgment by default and inquiry against Shearon, the very question before him was whether or not the answer constituted an answer for Shearon, and after hearing the matter, he found as a fact that Shearon had filed no answer in the cause. The defendant was bound by these findings of fact, in the absence of exception or appeal. *Bank v. Duke,* 187 N. C., 386; *Gillam v. Cherry,* 192 N. C., 195. Therefore, Judge Bond was correct in declining to vacate the judgment by default and inquiry upon the ground that it was irregular or procured through excusable neglect.

What, then, is the status of the parties?

The defendant Shearon has recorded against him a judgment by default and inquiry. *Connor, J.,* in *Mitchell v. Ahoskie,* 190 N. C., 235, said: "The judgment by default and inquiry established plaintiff's cause of action as alleged in his complaint, and his right to recover of defendant at least nominal damages. Both plaintiff and defendant are concluded by said judgment as to all matters alleged in the complaint as a basis for plaintiff's right of recovery. The cause of action set out in the complaint, and adjudged by the court to be well founded, both in fact and in law, determines the measure and character of damages which the plaintiff is entitled to recover therein from defendant. He is entitled to damages which flow from or arise out of said cause of action—no more and no less. The amount of these damages, to be ascertained by the jury from evidence relevant to an appropriate issue, only is left open for inquiry." In other words, a judgment by default and inquiry establishes the cause of action as alleged in the complaint. *Blow v. Joyner,* 156 N. C., 142; *Allen v. McPherson,* 168 N. C., 435; *Armstrong v. Asbury,* 170 N. C., 160.

Now, the cause of action alleged in the complaint was a mistake in the description and identification of the timber in the deed under which the defendant Shearon holds. In the former case of *Strickland v. Shearon,* this Court held, in effect, that no such cause of action was established by the evidence. Therefore, if the plaintiff is entitled to such damages only as flow from the cause of action alleged, and it appears that no such cause of action has been established, it must necessarily follow that the plaintiff has suffered no damage. Certainly, the defendant could not be required to pay damages for trespass in cutting timber which he held under a valid deed, and to which the plaintiff had no right or title. In effect, this would amount to allowing damages for a trespass committed by a man upon his own land, which could be supported neither by law nor reason. In our opinion the decision in *Strickland v. Shearon* deprives the judgment by default and inquiry of all vitality.

It appears from the record that Judge Bond did not rule upon the defendant's motion to dissolve the injunction contained in the judgment by default and inquiry, and the defendant is allowed to renew his motion to dissolve said injunction, if so advised.

Remanded.

NORTH CAROLINA AGRICULTURAL CREDIT CORPORATION v. JOHN H. BOUSHALL ET AL.

(Filed 20 April, 1927.)

1. Corporations—Officers—Scope of Employment — Quantum Meruit—Contracts.

An officer of a corporation cannot recover thereof for services rendered by him in the course and scope of his duties in the absence of an express contract to that effect made prior to their rendition, but only under certain circumstances for the reasonable value of services rendered entirely outside of the line of his duties as such officer.

2. Same—Attorney and Client.

Where an attorney, the officer of a trust company whose time was practically given to his duties thereto, has acted in his capacity as attorney for the formation of another financial corporation, and thereafter has in addition to his official duties of the trust company, accepted the position of president of the corporation so formed, he may not, in the absence of express contract therefor, receive additional compensation therefrom for services rendered as such president as implied upon a *quantum meruit.*

3. Appeal and Error—Evidence—Instructions—New Trials.

Prejudicial evidence erroneously admitted on the trial to the appellant's prejudice, recited in the charge as one of appellee's contentions and recognized in the charge as having a material bearing upon the result of the issue, is reversible error.

CIVIL ACTION, before *Bond, J.*, at November Term, 1926, of WAKE.

Plaintiff brought a suit against the defendants upon a promissory note in words and figures as follows: "Raleigh N. C., 3 March, 1925. $6,000.00. Three months after date we promise to pay to North Carolina Agricultural Credit Corporation, or order, the sum of $6,000.00, for value received."

The defendants filed an answer admitting the execution of said note, but asking for affirmative relief against the plaintiff upon a counterclaim in the sum of $12,584.77. In support of the counterclaim, the defendants offered evidence tending to show that the plaintiff, North Carolina Agricultural Credit Corporation, secured a charter about 4 November, 1923, which was accepted by the stockholders on 7 November, 1923. On 5 November, 1923, the corporation was organized and the defendant John H. Boushall was elected president of the corporation. A resolution was passed by the incorporators or stockholders declaring that the corporation should begin business when $100,000 of capital stock had been subscribed for. The defendant Boushall, at the time of the organization of said corporation, was trust officer for the Raleigh Savings Bank and Trust Company, and continued to occupy that position. The resolution of 5 November, 1923, directed the secretary-treasurer of the corporation to open books for subscription to the capital stock, and further, that when $100,000 of the capital stock had been subscribed for, the president should call a meeting for the purpose of electing additional directors, as provided by the by-laws of the corporation.

The evidence further tended to show that on 15 January, 1924, $100,000 in stock had been sold, and the corporation began business on that date. The defendant John H. Boushall alleged, and offered evidence tending to show, that from that date until March, 1925, he managed the corporation, prepared proper forms for loans made to farmers and for liens securing said loans, and passed upon said loans, and otherwise supervised and directed the affairs of the corporation.

The evidence showed that no provision was made by the corporation for a salary or compensation for the president, or for any other officer of the corporation, and the defendant alleges that the reasonable value of his services during said period of time was in excess of $12,000, which he sets up as an offset and counterclaim against the note sued on.

The issues and answers of the jury thereto were as follows:

1. In what amount, if any, are the defendants indebted to the plaintiff on the note described in the complaint? Answer: $6,000 and interest on same from 3 March, 1924.

2. In what amount, if any, is plaintiff indebted to defendant John H. Boushall? Answer: $6,000.

The judgment of the court decreed that the plaintiff take nothing by the action, and from this judgment the plaintiff appealed, assigning errors.

Cale K. Burgess and W. T. Joyner for plaintiff.
J. C. Little for defendants.

BROGDEN, J. Under what circumstances may an officer of a corporation recover compensation for services in the absence of an express contract?

In *Caho v. R. R.,* 147 N. C., p. 20, *Connor, J.,* said: "In the absence of an express promise, made prior to the performance of the service, an officer of a corporation cannot maintain an action for compensation that he cannot sue upon a *quantum meruit.*" "An officer has no right to compensation for services except by express agreement preceding the services rendered." "An agreement by the board of directors to pay an officer or director for past services, where there was no prior agreement to that effect, is without consideration, and is not binding on the corporation. But where there was a prior agreement for compensation, a vote of the directors, after the services were rendered, to pay for the same is valid and binding."

The next case in this State dealing with the question is *Chiles v. Mfg. Co.,* 167 N. C., 574. *Hoke, J.,* writing the opinion, quoting from *Taussig v. R. R.,* 166 Mo., p. 28, said: "The rule applicable to such a case, to be deduced from the modern and best considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation, entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood."

In *Borden v. Goldsboro,* 173 N. C., 661, involving a claim against a municipality for services, *Brown, J.,* said: "Officers of a municipal corporation are deemed to have accepted their office with knowledge of and with reference to the provisions of the charter or incorporating statute relating to the services which they may be called upon to render and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied *assumpsit* on the part of the corporation with respect to the services of its officers. In the absence of express contract, these determine and regulate the right of recovery, and the amount. This rule has been applied to officers of private corporations. *Caho v. R. R.,* 147 N. C., 20; *Chiles v. Mfg. Co.,* 167 N. C., 574."

It will therefore be observed, in passing, that the *Borden case* declares the law to be that the rule applicable to compensation to be paid by a municipality is the same as the rule governing the payment of compensation to officers of private corporations.

In *Fountain v. Pitt,* 171 N. C., 113, *Walker, J.,* states the law thus: "When there is an express contract, the party will recover according to its terms, and where there is a request for services, he may recover, as upon a *quantum meruit,* for their reasonable value, if they are rendered. Where there is no such contract or request, the general rule is that the corporation is not liable" (citing the *Caho* and *Chiles cases, supra*).

The foregoing general principles of law are supported and reiterated in a host of authorities. Thompson on Corporations, 2 ed., vol. 2, secs. 1736-1740-1741; Ann. Cas., 1915 A, p. 451, in which may be found the authorities in practically every state in the Union. L. R. A., 1917 F, 314-331, containing an exhaustive annotation of authorities upon every phase of the subject.

Two general principles emerge from authoritative decisions upon the subject, to wit: (1) That an officer of a corporation cannot recover for services rendered in the course and scope of his official duties, unless there has been an express contract authorizing compensation prior to the rendition of the services. (2) That an officer of a corporation may recover under certain circumstances the reasonable value of necessary services rendered entirely outside of the line and scope of his duties as such officer.

Now, the question immediately arises as to what are the essentials which create liability upon an implied contract. In *Fountain v. Pitt, supra, Justice Walker* called attention to the fact that the *Chiles case, supra,* contained "a limitation of the general rule, as laid down in *Taussig v. R. R., supra.*" In the *Taussig case* it appears that the plaintiff was an attorney, and upon the organization of the corporation, became secretary and treasurer thereof, and an action was brought by him against the defendant to recover for professional services rendered the corporation. At the conclusion of plaintiff's evidence there was judgment of nonsuit. The Court says: "It clearly appeared from the evidence that the services were rendered; that they were professional services; that they were of the value charged therefor; that they were performed at the instance of the general manager and directors, and the benefits thereof accepted by the corporation; and from the record, that a recovery was denied him on the ground that his employment was not evidenced by any formal recorded action of the board of directors fixing compensation for such services."

The general principle governing the right of an officer of a corporation to recover upon an implied contract for services is thus stated in L. R. A., 1917 F., p. 331: "To recover upon a *quantum meruit* for services rendered wholly outside the scope of his official duties, a director or officer must show, in addition to the fact that the services were extraordinary, that they were rendered under circumstances from which a promise to pay compensation may properly be implied. To raise such implication it is fairly well agreed that the circumstances must show an understanding on the part of the corporation at the time the services were being rendered that they were to be paid for, and also an understanding on the part of the person rendering such services that he was to be compensated therefor. A consideration of the cases leads to the belief that the failure of either party to have such understanding and expectation will prevent recovery upon implied contract."

However, practically all of the authorities agree that an officer of a corporation cannot recover for services rendered in the line of his official duties, in the absence of an express contract to pay for the services so rendered.

Applying the rules of law to the present case, it appears that the defendant was asked the following question: (Q.) What, in your opinion, would be a reasonable salary for you as president of that corporation? (A.) For supervising the work properly, I think that $300 per month would be the minimum. Plaintiff objected to the question and answer, and moved to strike out the answer. The evidence was allowed, and the plaintiff excepted. The trial judge, in his charge to the jury, in stating the contentions of the parties, called attention to this evidence, stating that Boushall contended "that $300 as president was a reasonable fee." This evidence was incompetent, and the plaintiff's exception thereto is sustained.

In the latter part of the charge the jury was instructed: "If the defendant Boushall rendered services to said corporation not germane to his position as officer of same, nor incident to his duties as such officer, the benefits of which, if any, were accepted and received by said corporation, the company knowing that he, Boushall, intended to charge for the same, if said company or its managing officer made no objection to same, and found his services valuable and accepted same, and further find that he never made any statement that he expected to make no charge for same, that he acted honestly and fairly in discharging his duties, the jury have a right to award him such sum as they find from the evidence was the reasonable value of such services as he rendered to said corporation."

It appears, therefore, that the trial judge, in substance, charged the jury that the defendant could recover upon his counterclaim for services rendered, not germane or incident to his office as president, and thus the evidence as to the right to recover $300 per month for services as president was left in the case, and not expressly withdrawn from consideration by the jury.

There are other serious exceptions in the record, but, as we are of the opinion that a new trial should be awarded for the reason given, we deem it inadvisable to discuss them.

New trial.

ELLINGTON & GUY, INC., v. D. W. CURRIE, A. M. CURRIE, AND L. N. WHITTED, PARTNERS, TRADING AS CURRIE-WHITTED LUMBER COMPANY.

(Filed 27 April, 1927.)

1. **Receivers—Equity—Partnership—Statutes—Remedy at Law — Claim and Delivery—Insolvency.**

   Where a partnership assumes to carry out the terms of a written contract to convert logs delivered by the plaintiff at its mills into lumber to be sold exclusively by the plaintiff, the manufactured product to belong to plaintiff, with an agreement for an accounting at stated periods and to arbitrate in the event of disagreement as to the settlements thus to be made: *Held*, the plaintiff has a remedy at law by claim and delivery, C. S., 830, against the defendants, pending litigation without the application of equitable principles, and his application for the appointment of a receiver under the provisions of our statutes should be denied, and especially so when from the facts found it does not distinctly appear on appeal that the defendants were insolvent, though this fact has been found adversely to the appealing defendant. C. S., 860.

2. **Same—Contracts—Constructive Possession—Principal and Agent.**

   Where a receivership is sought for a partnership under a contract providing in substance that the defendants have the subject-matter to be delivered exclusively upon the plaintiff's order after manufacturing the same for him, which was delivered by the plaintiff, and the defendants were to manufacture upon a commission basis: *Held*, the defendants hold the constructive possession of the manufactured product on their lands as the plaintiff's agents. C. S., 1208.

3. **Same—Contracts—Arbitration—Equity.**

   Where the ground for the appointment of a receiver in an action against a partnership is the failure of the defendant to account for the payment of commissions alleged to be due the plaintiff, a stipulation in the contract that such disagreement must be referred to arbitration, while not enforceable at law, may be considered by the court with other evidence in passing upon the question as to whether the injunction should be issued.

APPEAL by defendants from *Midyette, J.*, in Chambers, Fayetteville, N. C., 11 December, 1926. From CUMBERLAND. Error.

The material facts will be set forth in the opinion.

Rose & Lyon for plaintiff.
Dye & Clark for defendants.

CLARKSON, J. This is an action brought by plaintiff against the defendants for the appointment of receivers and an accounting. Ellington & Guy, Inc., and L. N. Whitted, on 15 June, 1926, entered into a certain contract. On 11 February, 1926, the defendants, partners trading and doing business as the Currie-Whitted Lumber Company, "assume and agree to carry out the contract." The contract, in substance: The defendant, L. N. Whitted, owned a planing mill and in connection a lumber yard. The plaintiff agreed to buy and pay for certain lumber to be placed on the yard, to enable him to carry lumber and supply his mill, settlement to be made weekly. Whitted was to assort and pile lumber on yard in good business-like way, to kiln-dry certain boards and to receive $2.50 per 1,000 for kiln-drying and also for yarding, dressing and loading. The plaintiff was also to pay monthly for lumber dressed and kiln-dried during the month. Plaintiff was to handle the lumber as *sales agent* to be paid (1) a flat seven per cent commission, (2) in addition six per cent interest on cash advances for lumber on a basis of monthly balances. The lumber piled on the yard "is the property of Ellington & Guy, Inc." Plaintiff in no way liable for mill operation, "but simply to pay the said Whitted the contract price as agreed for the yarding, dressing and drying of said lumber." No local sales to be made without submission, approval and payment to plaintiff. Contract subject to cancellation by either party by giving 30 days notice, and the "lumber on hand purchased under this contract is to be liquidated according to the terms of contract." The net profits and losses to be divided. "It is also agreed that in case of any dispute arising in any way connected with this said contract in the carrying out of same, that if the parties cannot agree, then they are to settle same by arbitration, each selecting the arbitrator, and they selecting the third, if necessary, and the parties hereto agree to abide by same." The two acknowledgments of 10 September, 1926, signed by all the defendants, admit that the lumber at certain yards is the property of plaintiff.

On 11 September, 1926, an agreement was entered into between the parties, D. W. Currie not signing, in regard to a dispute about the shortage of the lumber. The signing defendants admit a certain amount of shortage and agree to make good, an account and inventory to be taken, and the account adjusted between them on certain basis and each party to have access to the books and records of the lumber bought and sold under the existing contract. Letter from defendants to plaintiff, 11 October, 1926, complaining of not furnishing them with complete statement of account according to promise and stating that they had furnished statement each week. Further that orders were not sent in to keep plant running according to promise. The present suit was instituted 19 October, 1926.

We are dealing with a partnership. Art. 37, "Receivers," C. S., 860, says: "A receiver may be appointed (1) before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property, or its rents and profits are in danger of being lost, or materially injured or impaired, except in cases where judgment upon failure to answer may be had on application to the court."

In the present action temporary receivers were appointed for all the property of the defendants on 19 October, 1926, and 29 October, 1926, set to show cause why the receivership should not be made permanent. On 6 November the court made the following order: "The court ruled that the receivership be lifted as to all of the property and effects of the defendant, save only the above 452,000 feet of lumber on the yard of the defendant, purchased for the plaintiff under the contract referred to in the pleadings, that said lumber remain in the custody of the receivers heretofore appointed, and that all other property, books, records and effects of the defendant be returned to it by the receivers," etc.

The defendants contended that D. W. Currie was not insolvent and the other parties had theretofore met their obligations; that the Currie-Whitted Lumber Company was an active going concern, managing to take care of its maturing obligations at the time receivers were appointed; that pending a discussion of the difference with an engagement to meet the next morning, over night, the plaintiff had receivers appointed, without notice, and the following morning took charge of the entire property of the defendants; that this was done in direct violation of the terms of the contract, (1) that the lumber on hand purchased under the contract was to be liquidated in accordance with its terms; (2) that if there was any dispute same was to be settled by arbitration, which the parties agreed to abide by; that by the hasty and unwarranted appointment of receivers the plaintiff has wrecked their business and the credit of defendants is ruined, and no doubt many employees caused to be thrown out of work.

In 23 R. C. L., part sec. 3, p. 9, it is said: "The appointment of a receiver is part of the jurisdiction of equity, and is based on the inadequacy of the remedy at law, being intended to prevent injury to the thing in controversy, and to preserve it, *pendente lite,* for the security of all parties in interest, to be finally disposed of as the court may direct. It is held to be a proceeding *quasi in rem.* . . . The right to the relief must be clearly shown, and also the fact that there is no other safe or expedient remedy." *Twitty v. Logan,* 80 N. C., p. 69; *Hanna v. Hanna,* 89 N. C., p. 68; *Thompson v. Pope,* 183 N. C., p. 123. The case of *Kelly v. McLamb,* 182 N. C., at p. 158, and cases cited therein are not like the facts here.

Under the terms of the contract the lumber was the property of the plaintiff. Defendants could not even sell any of it without plaintiff's approval and the purchase price was then to be paid plaintiff. Plaintiff had a remedy at law, if the contract was breached by defendants, of claim and delivery. C. S., 830 *et seq.* If demand had been made for the property it might have been turned over without this ancillary or provisional remedy. The property in the present action, under C. S., 860(1), *supra:* A receiver can be appointed when a party "establishes an apparent right to property," the subject of the action and *in the possession of the adverse party,* when it or its rents or profits are in danger of being *lost or materially injured or impaired.* Possession can be either actual or constructive. In the present case the lumber was at least in the constructive possession of plaintiff. *S. v. Meyers,* 190 N. C., 239; *S. v. Pierce,* 192 N. C., p. 766. See *Staton v. Mullis,* 92 N. C., at p. 632, and cases cited. As to the shortage, if there was any, plaintiff had an action at law for the debt. Plaintiff cites C. S., 1208. This applies "when a corporation becomes insolvent," etc. The defendants are partners, but under C. S., 860 (4), is the following: "This article, Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder." This is true, but it is not clearly shown that D. W. Currie was "insolvent," or "is in imminent danger of insolvency." C. S., 1208, *supra.* Few business men in their career at some time or another, if hastily called, could meet their obligations notwithstanding they were solvent.

The contract between the parties calls for arbitration of any dispute and a solemn declaration to abide by same. It was further agreed that either party could, on 30 days notice, terminate the contract and liquidate, in accordance with its terms. It has generally been held that an agreement in an executory contract to submit dispute which arises thereunder to an arbitration, the effect of which is to "oust the courts of their jurisdiction," is against public policy; yet in a court of equity, seeking to do justice, in an application for a receiver, a provisional remedy, the breaching of this solemn agreement will be considered as a strong circumstance, with the other evidence, as to the right of the party who breached the agreement to have a receiver appointed. See *Jones v. R. R., ante,* 590. On the record we do not think it is clearly and affirmatively shown that D. W. Currie was *insolvent or is in imminent danger of insolvency.* The order of the court below, signed 11 December, 1926, says that defendants "is and was at the time of the service of process herein in imminent danger of insolvency." On the entire record we cannot so hold. Plaintiff had at least constructive possession of the property, and an adequate remedy at law of claim and delivery if on demand the property was refused to be turned over to the plaintiff. A remedy at law for shortage, if any. The careful judge in the court below turned back the property other than the lumber. Under C. S., 861, a bond could have been given, perhaps by defendants, if notice and opportunity had been presented. *Hurwitz v. Sand Co.,* 189 N. C., p. 1.

Under all the facts and circumstances of this case we think that receivers should not have been appointed. In the judgment of the court below there was

Error.

GREENE JACKSON TRIPP v. AMERICAN TOBACCO COMPANY ET AL.

(Filed 27 April, 1927.)

1. **Negligence—Punitive Damages.**

In order to award punitive damages in a civil action for a personal injury inflicted on the plaintiff, it must be made to appear by the evidence that the act complained of was maliciously done, in addition to the negligence upon which compensatory damages may be given by the jury, or in disregard to the criminal law, or aggravated by the indifference of the defendant to the safety of the plaintiff under the circumstances wherein the negligent act had been committed.

2. **Same—Questions of Law.**

The question as to whether there is any evidence sufficient to entitle the plaintiff to recover punitive damages of the defendant under the facts of a particular case, wherein compensatory damages are recoverable for the defendant's negligent act in the infliction of a personal injury, is one of law for the judge to decide.

3. **Same—Verdict—Appeal and Error.**

Where the nightwatchman of a corporation, within the scope of his duties, shoots one apparently a trespasser on the defendant's premises at night for an unlawful purpose, and all the evidence tends to show that the watchman did so by a reasonable mistake on his part, the facts are insufficient to submit an issue as to punitive damages to the jury, and the verdict awarding them will be stricken out on appeal.

APPEAL by defendants from *Cranmer, J.,* at January Term, 1927, of PITT.

Civil action for damages, tried upon the following issues:

"1. Was the plaintiff wrongfully and unlawfully assaulted by the defendant, W. H. Turner, as alleged in the complaint? Answer: Yes.

"2. If so, was the defendant, Turner, at the time of said assault, acting within the scope of his employment as nightwatchman of the defendant, American Tobacco Company? Answer: Yes.

"3. What compensatory damages, if any, is the plaintiff entitled to recover? Answer: $5,000.

"4. What punitive damages, if any, is plaintiff entitled to recover? Answer: $5,000."

The facts are that W. H. Turner was nightwatchman and special officer employed to guard the tobacco warehouse and premises of the American Tobacco Company in the city of Greenville, N. C.; that on the night of 17 September, 1925, the plaintiff, while walking along the edge of the premises of the American Tobacco Company, near a railroad switch, was shot by the said Turner and seriously injured. The plaintiff testified that as he was coming from behind the warehouse, it being between twilight and dark, some one (Turner) called to him and said: "Who is that?" to which he replied, "Oh, it is me. What do you want?" Not paying any attention to the man, plaintiff continued in his approach toward the street, and when he got within about ten feet of the man, Turner said, "Stop, Stop!" and the second time he said "Stop" he shot, the bullet striking plaintiff in the right chest. Plaintiff braced himself up against the building and continued toward the street. As he went by Turner he said, "You have shot me; maybe I'll die." Whereupon Turner said, "Lord have mercy; I didn't know who you were."

The defendant, W. H. Turner, testified that he did not know who Tripp was at the time he shot him, but thought he was a pillager and a trespasser, it being quite dark at the time, and that on account of plaintiff's refusal to stop when repeatedly commanded to do so, together with the harshness of his reply, and his quickened step, he (Turner) perceived it to be necessary to shoot to protect himself. As soon as the defendant discovered who the plaintiff was, he immediately exclaimed, "Lord, have mercy; why didn't you tell me who you were?"

From a judgment on the verdict in favor of plaintiff the defendants appeal, assigning errors.

J. C. Lanier and Albion Dunn for plaintiff.

Skinner, Cooper & Whedbee and F. G. James & Son for defendant, Tobacco Company.

S. J. Everett for defendant, Turner.

STACY, C. J. The chief exception presented by the record is the one which challenges the sufficiency of the evidence to warrant an award of punitive damages. The liability of the corporate defendant for punitive, as well as compensatory damages, in case the tort committed by the defendant, Turner, in the course of his employment was wilfully, wantonly and maliciously inflicted, is not seriously questioned. *May v. Tel. Co.,* 157 N. C., 416; *Stewart v. Lumber Co.,* 146 N. C., 47; *Hayes v. R. R.,* 141 N. C., 195; *Jackson v. Tel. Co.,* 139 N. C., 347; *Durham v.*

R. R., 108 N. C., 399; *Louis Pizitz Dry Goods Co. v. Yeldell,* 71 L. Ed., ..., decided 11 April, 1927; note, 48 L. R. A. (N. S.), 38. But the defendants stressfully contend that, on the evidence adduced in this case, only the issue of compensatory damages should have been submitted to the jury. A careful perusal of the record, viewed in the light of the pertinent authorities on the subject, leads us to the same conclusion. *Swain v. Oakey,* 190 N. C., 113; *Webb v. Tel. Co.,* 167 N. C., 483; *Cottle v. Johnson,* 179 N. C., 426; *Meeder v. R. R.,* 173 N. C., 57; *Hodges v. Hall,* 172 N. C., 29; *Ammons v. R. R.,* 140 N. C., 196; *Hansley v. R. R.,* 117 N. C., 565; *S. c.,* 115 N. C., 602; *Holmes v. R. R.,* 94 N. C., 318; *Causee v. Anders,* 20 N. C., 388; 8 R. C. L., 585 *et seq.;* 1 Sedgwick on Damages (9th), 686.

The following rule was adopted in *Holmes v. R. R.,* 94 N. C., 318, *Ashe, J.,* delivering the opinion of the Court: "Punitive damages are never awarded except in cases 'when there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury.' Thompson, Carrier of Passengers, 575; and to the same effect is 3 Southerland Damages, 270."

In *Day v. Woodworth,* 54 U. S., 363, the Supreme Court of the United States recognized the power of the jury, in certain tort actions, to assess punitive or exemplary damages, when circumstances warranting their imposition are properly made to appear. *Mr. Justice Grier,* delivering the opinion of the Court in that case, said:

"It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindicative damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common, as well as the statute law, men are often punished for aggravated misconduct or lawless acts, by means of civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard, and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."

Again, in *R. R. v. Quigley,* 62 U. S., 202, *Mr. Justice Campbell,* speaking for the Court, said: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations."

And in *R. R. v. Arms,* 91 U. S., 489, *Mr. Justice Davis,* delivering the opinion of the Court, said: "Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."

See, also, valuable opinion of *Sanborn, Circuit Judge,* in *Times Pub. Co. v. Carlisle,* 94 Fed., 762, and 1 Sedgwick on Damages (9th), 686, for the origin and history of the rule respecting exemplary damages.

There is a marked distinction between responsibility for an injury and liability for assessment of punitive damages. *Swain v. Oakey,* 190 N. C., 113; *Stanford v. Grocery Co.,* 143 N. C., 419.

Punitive, vindictive or exemplary damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. *Carmichael v. Tel. Co.,* 157 N. C., 21; *S. c.,* 162 N. C., 333; *Brown v. Electric Co.,* 138 N. C., 533; *Mosseller v. Deaver,* 106 N. C., 494; *Reeves v. Winn,* 97 N. C., 246; *Anderson v. Harvester Co.,* 104 Minn., 49, 16 L. R. A. (N. S.), 440, and note. Where these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendant. *Knowles v. R. R.,* 102 N. C., 59; *Bowden v. Bailes,* 101 N. C., 612; *Johnson v. Allen,* 100 N. C., 131; 8 R. C. L., 606. In this jurisdiction such damages are awarded on the ground of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. *Stanford v. Grocery Co.,* 143 N. C., 419. In proper cases, both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury. *Cobb v. R. R.,* 175 N. C., 132; *Fields v. Bynum,* 156 N. C., 413; *Hayes v. R. R.,* 141 N. C., 199; *Smithwick v. Ward,* 52 N. C., 64. However, the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case. *Ford v. McAnally,* 182 N. C., 419; *Gilreath v. Allen,* 32 N. C., 67; *Sloan v. Edwards,* 61 Md., 100; 8 R. C. L., 606. "Compensatory damages are based upon injuries suffered by the plaintiff, while punitive damages are awarded upon wrongs intended by the defendant." *Cotton v. Fisheries Co.,* 181 N. C., 151.

Whether there is any evidence, in a given case, sufficient to justify the assessment of punitive damages, is a question of law for the court, and if, as here, none has been offered, it is error to submit the question to the jury. *Waters v. Lumber Co.,* 115 N. C., 649; *Holmes v. R. R.,* 94 N. C., 318.

The remaining exceptions present no new question of law, or one not heretofore settled by our decisions. We have carefully examined them all and are of opinion that they should be resolved in favor of the validity of the trial.

It follows, from what is said above, that the fourth issue should be disregarded and stricken out, and judgment entered for the plaintiff upon the remaining issues, including the costs incurred in both the trial court and the appellate court.

Modified and affirmed.

LEAKSVILLE LIGHT AND POWER COMPANY v. GEORGIA CASUALTY COMPANY.

(Filed 27 April, 1927.)

Election of Remedies—Conflicting Remedies—Principal and Surety—Insurance—Indemnity—Policies—Contracts—Actions at Law—Equity—Judgments—Estoppel.

Where a party has elected to pursue a remedy at law, with knowledge of the facts, and is unsuccessful therein, he may not thereafter apply to a court of equity for the same relief, the remedies being directly opposed to each other, and where the insured under an indemnity bond against liability for negligent injury to other than its employees has unsuccessfully pursued its remedy under its policy contract, he may not, after final judgment therein, maintain a suit to reform the same instrument and recover under the provisions of the contract as and when reformed.

APPEAL by plaintiff from *Oglesby, J.*, at November Term, 1926, of ROCKINGHAM.

Civil action to reform a contract of insurance and to recover upon it as, if, and when reformed.

On 24 May, 1921, the defendant, a Georgia corporation, issued to the plaintiff at Leaksville, N. C., a policy of insurance indemnifying the assured against claims for bodily injuries, etc., suffered by any one, not an employee of the plaintiff, by reason of the operation of its light and power plant. The policy provides that it "does not cover loss arising from injuries or death caused by any draft or any driving animal or any vehicle or by any person while in charge thereof."

While said policy was in force one John J. Robertson, not an employee of the plaintiff, was injured by the negligent operation of one of plaintiff's trucks, which was being driven along a public highway, loaded with electric-light poles intended for use in plaintiff's business.

Suit was brought by the said John J. Robertson against the plaintiff, and finally settled by compromise judgment for $5,000, agreed by all to be a fair settlement.

Thereafter the plaintiff brought suit against the defendant in the Superior Court of Rockingham County to recover the amount paid Robertson in settlement of his claim for personal injuries, the plaintiff contending that the policy covered the injury to Robertson, while the defendant contended that it did not. The facts not being in dispute, a jury trial was waived and the matter submitted to the court on facts agreed, among which appears the following:

"It is agreed between the plaintiff and defendant that the liability of the defendant and the right of the plaintiff to recover of it in this action depends upon the construction which the court shall give to the Contractors' Public Liability policy herein sued upon, a copy of which is hereto attached, marked Exhibit A, and made a part of this statement of facts."

Judgment was rendered in that case, holding that the policy did not cover the injuries sustained by Robertson. This was affirmed on appeal. *Power Co. v. Casualty Co.*, 188 N. C., 597.

Later the plaintiff instituted this action to reform the policy, alleging that it was intended to cover claims for injuries such as those sustained by Robertson, and seeks to recover upon the policy as thus reformed. The defendant pleads *res adjudicata* and estoppel by judgment, or estoppel by election of remedies made with full knowledge of the facts.

From a judgment on the pleadings in favor of defendant the plaintiff appeals, assigning errors.

King, Sapp & King and Brooks, Parker, Smith & Hayes for plaintiff.
John N. Wilson for defendant.

STACY, C. J., after stating the case: The appeal presents for the first time in this jurisdiction the single question as to whether a party, with full knowledge of his rights, who brings an action to recover on a policy of insurance as it is written, and loses in said action, may thereafter maintain a suit in equity to reform the contract and recover upon it as, if, and when reformed.

According to the clear weight of authority in other jurisdictions, where the question has been considered, the rule is that when a party brings an action at law to recover on a contract as written, and proceeds to trial, verdict and judgment in that suit, he cannot thereafter, while said judgment is still in force, institute proceedings in equity to reform the contract and recover upon it as reformed. It is generally held that one who elects to sue on an instrument as it is written, and fails in such suit, is bound by the election which he thus makes to stand by the contract, and he cannot thereafter maintain an action to reform the contract and recover upon it as reformed. The two remedies are inconsistent, since the one affirms and the other seeks to disaffirm the contract. *Royal Ins. Co. v. Stewart,* 190 Ind., 444; *Washburn v. Ins. Co.,* 114 Mass., 175; *Thwing v. Ins. Co.,* 111 Mass., 93; *Steinbach v. Ins. Co.,* 77 N. Y., 498; *Thomas v. Ins. Co.,* 108 Ill. App., 278; *Thomas v. Joslin,* 36 Minn., 1; 2 Black on Judgments, sec. 632; 2 Freeman on Judgments (5th), sec. 631; 9 R. C. L., 966.

"Any decisive act of the party, with knowledge of his rights and the fact, determines his election in the case of conflicting and inconsistent remedies. . . . There cannot be any doubt of the principle that equity will not relieve a party fully apprised of his rights and deliberately confirming a former act. The doctrine has been again and again declared." *Chancellor Kent* in *Sanger v. Wood,* 3 Johns., ch. 416.

Speaking to the identical question in *Royal Ins. Co. v. Stewart,* 190 Ind., 444, *Ewbank, J.,* in the course of an elaborate opinion, citing and distinguishing many of the cases dealing with the subject, said: "The general rule is that a party cannot assume successive positions in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory. Thus a judgment on the merits in favor of the defendant in an action for specific performance of a contract for the sale of real estate will bar another action to reform the contract and to enforce it as reformed. Where a party elects to sue upon a written contract as executed, and the action proceeds to trial and judgment, he cannot thereafter bring an action to reform the contract. 2 Black, Judgments, sec. 632. When a party has brought an action at law on a policy as written and has prosecuted it to judgment, and a judgment against him has been rendered thereon, he cannot subsequently bring proceedings in equity to reform the contract. Having elected to pursue his remedy by an action at law upon the policy as it was written, he thereby elects to treat it as embodying the contract, and cannot subsequently deny the fact."

The decision in *Northern Assurance Company v. Grandview Building Association,* 203 U. S., 106, strongly relied upon by plaintiff, as we understand it, is not at variance with, but in support of, the general trend of authorities on the subject. *Royal Ins. Co. v. Stewart, supra.*

As bearing generally upon the conclusiveness of judgments rendered in actions where the parties are fully apprised of their rights, see *Polson v. Strickland, ante,* 299; *Hardison v. Everett,* 192 N. C., 374; *Moore v. Edwards,* 192 N. C., 446; *Clothing Co. v. Hay,* 163 N. C., 495; *Coltrane v. Laughlin,* 157 N. C., 282; *Tyler v. Capehart,* 125 N. C., 64; *Grantham v. Kennedy,* 91 N. C., 151; *Gay v. Stancell,* 76 N. C., 372; *Armfield v. Moore,* 44 N. C., 157, at pp. 161 and 162.

The plaintiff knew when it brought its first action to recover on the policy as written, or was advised before entering upon the trial of said cause, that the defendant denied liability under the contract. It did not seek in that suit to amend its complaint and ask for a reformation of the contract, as it is now doing, but elected to stand upon the policy as executed and to stake all upon its right to recover thereunder.

The election made in that suit, therefore, estops the plaintiff from proceeding in the present action. The trial court committed no error in entering judgment to this effect.

Affirmed.

STATE v. WILLIAM BRANCH.

(Filed 27 April, 1927.)

1. Homicide—Evidence—Verdict.

Upon the trial for a homicide the jury may accept in part the defendant's evidence tending to establish his innocence and convict him upon other evidence tending to establish his guilt beyond a reasonable doubt, and where the evidence thus introduced is sufficient to convict the defendant of murder, both in the first and second degree, a verdict convicting the defendant of the lesser crime will be sustained.

2. **Same—Malice—Presumptions.**

Evidence that a prisoner killed the deceased with a pistol shot is sufficient of malice necessary to sustain a verdict of murder in the second degree.

3. **Appeal and Error—Objections and Exceptions—Instructions.**

Where it is contended on appeal that the court erroneously instructed the jury upon the evidence of the case, the appealing party must aptly except to the instruction or a refusal of a proper prayer therefor, or it will not be considered on appeal.

4. **Appeal and Error—Instructions—Harmless Error.**

Where upon the trial for a homicide the defendant is convicted of murder in the second degree, an exception to a charge on the issue of murder in the first degree is not prejudicial error.

5. **Homicide—Evidence—Letters—Husband and Wife.**

Letters introduced on the trial for a homicide from the prisoner to his wife, properly identified by a third person and introduced by him without the procurement of the wife, may be received as evidence.

APPEAL by defendant from *Daniels, J.*, at November Term, 1926, of GRANVILLE. No error.

Indictment for murder. From judgment upon the verdict, to wit, that defendant is guilty of murder in the second degree, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

T. Lanier, G. M. Beam and John W. Hester for defendant.

CONNOR, J. The evidence on behalf of the State tends to show that Clyde Cannady was shot and instantly killed, while in an automobile on the public road leading from Franklinton to Oxford on Christmas Eve night, 1924.

The body of Clyde Cannady was found in his automobile on Christmas morning, 1924, between eight and nine o'clock. There were two bullet wounds upon his head—one near the eye and the other on his cheek. These wounds caused his death. In the opinion of Dr. J. A. Morris, the county health officer, who examined the body soon after it was discovered, deceased had been dead for more than six hours.

Pistol shots were heard between 11 and 12 o'clock Christmas Eve night, 1924, at a distance of about half a mile from the place where the automobile was found the next morning. The sound of these pistol shots indicated that they were fired near the place where the body of deceased was found. It came from that direction. A pistol was found in the automobile at the time the body of deceased was discovered. It was not loaded and had not been fired. There was evidence that this pistol belonged to the deceased. It was found on the shelf in the automobile, back of the seat.

The automobile, when found on Christmas morning, was on the right-hand side of the road, near the edge of an open field. Its tracks indicated that it had been turned out of the road about ten feet from where it was standing, and that it had not been stopped suddenly. Its lights were still burning; the key was in the switch. Both doors were closed and the windows were up. There was a small hole, evidently made by a bullet, through the glass of the door on the left-hand side. There were tracks of a man on the ground, on the right side of the automobile, which was headed toward Oxford. Deceased was sitting under the steering wheel, as if he had been driving the automobile; he had fallen over to the right side, with his head toward the right-hand door. His clothes were bloody; his pockets had been turned inside out, and were stained with blood. Blood was smeared on the back of his overcoat as if some one had put his arms around him. No money, except some small change, was found in the pockets of deceased. In the back of the automobile—a Ford coupe—there were twelve gallons of whiskey, in half-gallon Mason fruit jars. There was evidence tending to show that deceased was engaged in the manufacture and sale of whiskey, and that it was his purpose to take the whiskey found in his possession to Richmond on Christmas day.

The evidence relied upon by the State to establish the guilt of defendant was, chiefly, the testimony of two witnesses as to statements made by defendant to each of them, one in May, and the other in July, 1925. These statements were made after another person had been tried on an indictment for the murder of Clyde Cannady and acquitted. Both witnesses testified that defendant told them that he was the man who had shot Clyde Cannady. These witnesses testified that defendant told each of them that he and the person who had been tried and acquitted had been hired to kill Cannady, and had received one hundred dollars for doing so; that they had divided the money. There was evidence from which the jury could find facts and circumstances tending to corroborate these witnesses and to sustain the contention of the State that defendant shot Clyde Cannady with a pistol, thus causing his death.

Defendant, as a witness in his own behalf, denied that he had made statements to either of these witnesses as testified by them. He offered evidence tending to impeach the witnesses whose testimony was offered by the State as evidence of confessions by the defendant, and also evidence to contradict and impeach the witnesses whose testimony tended to show that defendant had been with deceased during Christmas Eve night, prior to the time at which the State contended that deceased was shot and killed. There was evidence, also, on behalf of defendant, tending to corroborate his testimony with respect to his defense of an alibi.

The evidence on behalf of the State is sufficient to sustain its contention that defendant killed Clyde Cannady, with a deadly weapon, and is therefore guilty of murder in the second degree, at least. There was also evidence from which the jury might well have found that defendant was guilty of murder in the first degree if they believed the evidence, and found the facts to be as the evidence tended to show beyond a reasonable doubt. This evidence tended to show that the murder was a deliberate and premeditated killing, and was committed in the perpetration or attempt to perpetrate a felony. The credibility and weight of the evidence, however, was necessarily to be determined by the jury. A jury may believe and accept part of the State's evidence, and reject part, because they are not satisfied beyond a reasonable doubt of the truth of the evidence which they reject. Defendant cannot complain that the jury did not find from the evidence, beyond a reasonable doubt, facts which the court instructed them must be so established before they could return a verdict of guilty of murder in the first degree. Defendant's contention that there was error on the trial below because there was no evidence to sustain the verdict that defendant is guilty of murder in the second degree cannot be sustained. Defendant did not request an instruction in accordance with this contention, nor did he except to the charge in which the court instructed the jury with respect to murder in the second degree. The contention is not properly presented upon this record. If, however, it had been properly presented and could be sustained, the error would not be prejudicial to defendant. In *S. v. Casey,* 159 N. C., 472, it is said to be the settled law of this State "that the prisoner cannot complain of an instruction which could not possibly be prejudicial to him, but was in his favor." The jury having found from competent evidence, beyond a reasonable doubt, under instructions free from error, that defendant killed the deceased, with a deadly weapon, defendant cannot complain that the jury were not further satisfied beyond a reasonable doubt that he killed deceased, after deliberation and premeditation, or in the perpetration or attempt to perpetrate a felony.

Within ten days after Clyde Cannady was shot and killed, defendant left his home in this State and went to Hartford, Conn. He remained there for about seven weeks and then returned home. While in Connecticut defendant wrote and sent, by mail, certain letters to his wife, who had remained at their home in this State. The wife gave these letters, at the request of defendant, to Mr. Kearney. They were offered in evidence by the State. Defendant objected to the introduction of these letters and excepted to the refusal of the court to sustain his objections. The assignment of error based upon this exception cannot be sustained. The letters were sufficiently identified. *Chair Co. v. Crawford, ante,* 531. They were brought into court, not by the wife, but by a third person to whom she had voluntarily given them, at the request of defendant. *S. v. Wallace,* 162 N. C., 623. There is no evidence tending to show that she gave them to Mr. Kearney to be used as evidence against defendant. The letters have but little probative value as evidence, and their introduction could not be held as error entitling defendant to a new trial.

We find no error in this record and the judgment is affirmed.

No error.

MERCHANTS AND FARMERS BANK v. W. J. HARRINGTON ET AL.

(Filed 27 April, 1927.)

Appeal and Error—Supreme Court Equally Divided in Opinion—Judgments—Records—Liens—Deeds and Conveyances.

The Supreme Court being equally divided on this appeal, *Adams, J.,* not sitting, as to whether a mortgage on real estate is sufficiently registered when placed in a chattel mortgage book by the register of deeds, who kept a separate book for such purpose, the judgment of the Superior Court that such registration was not sufficient is affirmed.

ADAMS, J., not sitting.

CIVIL ACTION, before *Stack, J.,* at February Term, 1927, of MOORE.

On 14 May, 1919, the defendant, Harrington, gave a mortgage on his lands to the Federal Land Bank of Columbia to secure notes aggregating $10,000. This mortgage was duly recorded and indexed on 17 May, 1919.

On 30 March, 1921, W. J. Harrington executed and delivered two promissory negotiable notes for $1,401.45 each to the Tomlinson Guano Company, payable on 15 February, 1922. To secure these notes the maker executed a certain instrument in the form of an agricultural lien, but in reality a mortgage upon his real estate. However, the said mortgage was recorded in a chattel mortgage book and duly indexed and cross-indexed in Cross-Index Books for Chattel Mortgages in the office of the register of deeds. The instrument was neither recorded in a real estate mortgage book nor indexed nor cross-indexed as a mortgage on land. Thereafter, on 7 February, 1922, the Tomlinson Guano Company endorsed said notes to the plaintiff bank and delivered to it the said mortgage securing same.

On 27 April, 1921, the defendant Harrington gave a mortgage to Page Trust Company to secure a note for $5,433. This mortgage was duly recorded and indexed on 20 July, 1921.

Several issues were submitted to the jury, but those pertinent to the point in controversy were as follows:

"Was the mortgage executed and delivered by W. J. Harrington to Tomlinson Guano Company set up in the complaint indexed and cross-indexed on the general index to real estate conveyances in the office of the register of deeds of Moore County after 21 July, 1921? Answer: Yes.

"Was the paper-writing from W. J. Harrington to Tomlinson Guano Company, and which is described in the pleadings, placed upon the index and cross-index of the general index to real estate conveyances in the office of the register of deeds for Moore County by being interlined therein after 3 July, 1924? Answer: Yes.

"Has the paper-writing from W. J. Harrington to Tomlinson Guano Company, and which is described in the pleadings, ever been indexed or cross-indexed upon the index and cross-index to real estate conveyances in the office of the register of deeds for Moore County? Answer: No.

"Was the mortgage executed and delivered by W. J. Harrington to Tomlinson Guano Company, described in the complaint, duly filed and registered in the office of the register of deeds for Moore County in Chattel Mortgage Book 23, page 341, and duly indexed and cross-indexed in Cross-Index Books for Chattel Mortgages on 13 April, 1921? Answer: Yes."

Upon the foregoing issues the trial judge, being of the opinion that the indexing and cross-indexing to chattel mortgages created no lien upon the lands therein described, and that an index and a cross-index on the general index and cross-index to land instruments was necessary to create such a lien, held as a matter of law upon the verdict that the plaintiff's lien was subsequent to that of the other parties to the proceeding, and signed judgment to that effect, from which judgment plaintiff appealed.

It also appeared in the evidence that the register of deeds for Moore County, at all times during the transactions referred to, kept a general index and cross-index of chattel mortgages and in an entirely separate book a general index and cross-index to land instruments.

Teague & Teague and Gavin & Jackson for plaintiff.
Hoyle & Hoyle and J. C. Little for defendant.

PER CURIAM. The question involved is thus stated in plaintiff's brief:

"Was the indexing and cross-indexing of a real estate mortgage, which on its face was a combination real estate and chattel mortgage, on the general cross-index of chattel mortgages and not on the general cross-index to real estate conveyances sufficient to give constructive notice to subsequent purchasers for value, when there is kept in the register's office a separate record and set of books for the registration and indexing of chattel mortgages and real estate conveyances, and when only real estate is conveyed by the instrument in controversy, said mortgage being dated 30 March, 1921, and filed for registration 13 April, 1921?"

The importance of the question to the profession and to the registers of deeds throughout the State is obvious. If the recording of a land mortgage in a chattel mortgage book and the indexing thereof upon the cross-index of a chattel mortgage book is sufficient to create a lien upon real estate, then, every attorney in the State, in examining a title to land, must search and examine every sort of index in the office of the register of deeds for every character of instrument that is recorded or required to be recorded.

Upon the other hand, ought the holder of a lien to be deprived of the benefit thereof when he delivers it to the register of deeds for recording and it is indexed and cross-indexed in one of the general indexes kept in his office?

The statutes bearing upon the subject are C. S., 3560 and 3561. The decisions of this Court, dealing with the indexing and cross-indexing of instruments are *Fowle v. Ham,* 176 N. C., 12; *Ely v. Norman,* 175 N. C., 294; *Wilkinson v. Wallace,* 192 N. C., 156.

However, *Adams, J.,* did not sit and took no part in the decision of this case, and the Court, being evenly divided in opinion, under the law the judgment of the lower court must be affirmed without becoming a precedent.

Affirmed.

ADAMS, J., not sitting.

BOARD OF DRAINAGE COMMISSIONERS OF LYON SWAMP DRAINAGE AND LEVEE DISTRICT v. C. B. BORDEAUX, L. F. PRIDGEN, H. L. HARRELL, WALTER RUSS, DANIEL SHAW AND J. J. PRIDGEN.

(Filed 27 April, 1927.)

1. **Drainage—Districts—Assessments—Interest—Statutes.**

Owners of land in a drainage district in default in the payment of assessments thereon on the first Monday of September, when under the provisions of the statute, C. S., 5361, they are due and payable, are chargeable with interest from that date, and the provisions of C. S., 7994, allowing certain discounts and imposing certain penalties, has no application.

2. Same—Interpretation of Statutes—Retroactive Effect.

The provisions of C. S., 5362, authorizing the sheriff of the county wherein is located a drainage district to levy and collect the assessments against the delinquent owners out of their other property by levy, etc., are those included in chapter 442, Public Laws of 1909, as amended by chapter 67, Public Laws of 1911, and cannot be given a retroactive effect.

APPEAL by defendants from judgment rendered by *Grady, J.*, at chambers, on 27 December, 1926. Modified and affirmed.

Action to recover of each of the defendants drainage taxes assessed upon his land located in Lyon Swamp Drainage and Levee District, and for other relief.

From judgment upon facts found by the judge defendants appealed to the Supreme Court.

Grady & Johnson for plaintiff.
C. E. McCullen for defendants.

CONNOR, J. The Lyon Swamp Drainage and Levee District was established by the final order of the clerk of the Superior Court of Pender County, dated 10 August, 1910, in a proceeding then pending before him. Defendants are the owners of lands included in said district. The amounts which plaintiff seeks to recover in this action were included in an assessment duly made in said proceeding in 1918, pursuant to a valid order made by said clerk. See *In re Lyon Swamp Drainage District*, 175 N. C., 270.

These amounts were assessed for the years 1921 to 1925, inclusive. They all became due and payable on the first Monday in September of the year for which they were assessed, respectively. C. S., 5361. Neither of the defendants has paid the amounts assessed against his land. Judgment was rendered that plaintiff recover these several amounts, with interest at six per cent from the first Monday in September of the year for which they were respectively assessed. Defendants contend that there was error in holding that said amounts bear interest from the first Monday in September of the year in which they were due.

The statute, C. S., 5361, provides that these assessments "shall be due and payable on the first Monday in September each year, and if the same shall not be paid in full by the thirty-first day of December following, it shall be the duty of the sheriff or tax collector to sell the lands so delinquent." No provision is contained in the statute for the collection of interest on drainage taxes or of penalties for failure to pay such taxes when due. It is provided therein, however, that "the existing general tax law in force when sales are made for delinquent assessments shall have application in redeeming lands so sold, and in all other respects, except as to the time of sale of lands, the existing law as to the collection of State and county taxes shall apply to the collection of such drainage assessments." In C. S., 7994, it is provided, with reference to State and county taxes, that "all taxes shall be due on the first Monday in October in each year." There is no statutory provision for the collection of interest on State and county taxes not paid when due. It is provided, however, that certain discounts shall be allowed upon such taxes when paid prior to 1 December, and that certain penalties shall be collected when such taxes are not paid until after 1 January. In the absence of express statutory provisions to that effect, it cannot be held that these discounts or penalties apply to drainage taxes. They are assessed upon a different principle from that upon which State and county taxes are levied and collected. The general tax law applies only to the collection of drainage taxes, and has no effect in determining the amount to be paid, whether before or after they are due.

Drainage taxes are due and payable on first Monday in September, but are not collectible until 31 December. All owners of lands subject to drainage taxes may pay the same on any day between the first Monday in September and the thirty-first day of December of the year for which such tax was assessed. Those who pay between these dates are required to pay only the amount assessed against their lands. If payment is not made prior to thirty-first day of December, the tax is collectible by sale of the land. On said date the landowner who has not paid the tax is in default, and is justly required to pay interest from such date. See *Wilmington v. McDonald,* 133 N. C., 548, and *Wilmington v. Cronly,* 122 N. C., 390. He cannot, however, be required to pay interest until he is in default. Defendants' contention with respect to the date from which the drainage tax bears interest is sustained.

In the judgment from which defendants appealed to this Court, it is provided that "if the lands belonging to the defendants, or to each of them, upon which this judgment is declared a lien, shall fail to bring at public sale, as hereinafter provided, a sufficient amount to pay this judgment for the assessment herein set out, then the sheriff shall proceed to collect any balance due on this judgment against each of the defendants out of any other property, real or personal, belonging to each of the defendants at the time the assessment was made, which may be found in his county, as provided in C. S., 5362."

Defendants excepted to this provision of the judgment, contending that only the land upon which the drainage tax was assessed may be sold for its collection. This contention must be sustained, unless C. S., 5362, is applicable to the drainage taxes, which are the subject-matters of this action. See *Canal Co. v. Whitley,* 172 N. C., 100, *Raleigh v. Peace,* 110 N. C., 33; Eliott on Streets and Roads, 400.

C. S., 5362, is section 2 of chapter 282, Public Laws 1919. It was ratified on 11 March, 1919, and has been in force since said date. It is provided therein, "that if for any cause the sheriff is unable to collect the amount of the assessment made by the drainage commissioners out of lands assessed under the provisions of chapter 442, Public Laws 1909, as amended by chapter 67, Public Laws 1911, then the said assessment shall be collectible as taxes are collected out of any other property, real or personal, belonging to the person owning the land at the time such assessment was made."

The proceeding in which drainage taxes were assessed against the lands of defendants was begun in 1910; the orders authorizing and directing the assessments were made in 1918. The statute is not retroactive by its terms; it cannot be so construed. Whether it is valid or not, it cannot be held to impose personal liability upon the defendants in this action for drainage taxes assessed upon their lands prior to its enactment. Defendants were not personally liable for the taxes at the time they were assessed. Only the lands which were benefited by the improvements for the payment of which the taxes were assessed, were liable for their payment. It was error to direct the sheriff to levy upon and sell property, real or personal, of the defendants which had not been benefited by the improvements. Only lands located within a drainage district which share in the benefits accruing from the organization and maintenance of the district were liable for drainage taxes prior to 11 March, 1919. The contention of defendants must be sustained. The judgment must be modified in accordance with this opinion. As thus modified the judgment is

Affirmed.

JULIUS THOMAS v. S. F. WATKINS AND MANN WATKINS, ADMINISTRATORS OF DR. J. W. WATKINS, DECEASED.

(Filed 27 April, 1927.)

1. **Judgments—Interest—Verdict—Contracts—Tort—Statutes.**

   Where a verdict is given in an action on contract in plaintiff's favor for moneys due by the defendant to his intestate, interest is also given the plaintiff on the amount of the recovery as a matter of law, when not incorporated in the verdict. C. S., 2309. When in tort the matter of interest is awarded or not according as the jury may find.

2. **Appeal and Error—Judgments—Erroneous Judgments.**

   An appeal or *certiorari* is the procedure to correct a judgment claimed to have been erroneously entered.

APPEAL by plaintiff from *Oglesby, J.*, at November Term, 1926, of ROCKINGHAM. Reversed.

A judgment was obtained by plaintiff against defendants at April Term, 1926, of the county court of Rockingham County, N. C., before Judge Hunter K. Penn and a jury. The jury rendered a verdict in the sum of $958.50 in favor of plaintiff. Board and services $640, boarding horse $120, money advanced $198.50. These amounts were found to be due plaintiff by virtue of certain contracts made between plaintiff and defendants' intestate. The judgment of the General County Court, signed by the judge, was for $958.50 *and interest from 1 September, 1924, until paid,* the date when defendants' intestate died. On 29 September, 1926, defendants gave plaintiff notice that on 9 October, 1926, they would "move the General County Court . . . to reform certain judgment rendered . . . during April Term, 1926, to conform to the issue as found by the jury." In the verdict the jury did not allow interest, but it was put in the judgment. The court several terms after, at October Term, 1926, found certain facts and struck from the judgment rendered at April Term, 1926, "and interest thereon from 1 September, 1924, until paid," and signed another judgment as of 21 April, 1926, *nunc pro tunc,* "$958.50, together with interest thereon until paid." Plaintiff duly excepted and appealed to the Superior Court. At November Term, 1926, the Superior Court sustained the judgment *nunc pro tunc* of the General County Court that disallowed and struck out the interest from 1 September, 1924. Plaintiff appealed from this judgment to the Supreme Court.

P. T. Stiers for plaintiff.
Glidewell, Dunn & Gwyn for defendants.

CLARKSON, J. Plaintiff's action against defendants' intestate was on *contract,* not *tort.* Plaintiff sued on contracts. The jury found that defendants' intestate owed plaintiff for "board and services $640, boarding horse $120, money advanced $198.50." The defendants' intestate died on 1 September, 1924. We think plaintiff was entitled to interest on the contracts from that date and the judgment, as originally rendered, was not erroneous.

In *Lumber Co. v. R. R.,* 141 N. C., at p. 192, *Connor, J.,* said: "His Honor gave judgment for the amount sued for and interest, to which defendant excepted. We think his Honor was correct. The theory upon which the plaintiff recovers is that the defendant has received the money wrongfully and the law implies a promise to repay it. The action was originally equitable in its character and founded upon the theory that in good conscience the defendant should repay the money wrongfully received, and from this duty the law implied a promise so to do. We see no reason why the amount should not draw interest. Revisal, sec. 1954 (C. S., 2309); *Barlow v. Norfleet,* 72 N. C., 535; *Farmer v. Willard,* 75 N. C., 401. The cases cited by defendant were actions in tort, wherein the jury may or may not allow interest, as they see proper. In this lies the distinction."

In the *Farmer case, supra,* at p. 403, "It was not necessary for the jury to give interest. The law gives it and the court was authorized to give judgment accordingly." *Bond v. Cotton Mills,* 166 N. C., p. 20; *Chatham v. Realty Co.,* 174 N. C., p. 671; *Croom v. Lumber Co.,* 182 N. C., 217; *Bryant v. Lumber Co.,* 192 N. C., 607.

On the other question presented we may say that the position of the defendants cannot be upheld under well settled law. 1 Freeman on Judgments, 5 ed., part sec. 140, p. 267, quoting Coke Litt., 260a; 3 Bl. Com., 407; Freeman, *supra,* sec. 141; *Moore v. Hinnant,* 90 N. C., at p. 165-6; *Creed v. Marshall,* 160 N. C., 394; *Mann v. Mann,* 176 N. C., p. 353, citing a wealth of authorities; *Johnson v. Brothers,* 178 N. C., at p. 392.

An erroneous judgment should be corrected by appeal or *certiorari.* See irregular, erroneous or void judgments discussed in *Finger v. Smith,* 191 N. C., p. 818.

For the reasons given, the judgment below is

Reversed.

W. V. BUTLER v. ARMOUR FERTILIZER WORKS.

(Filed 27 April, 1927.)

1. **Negligence—Master and Servant—Safe Place to Work—Nondelegable Duty—Fellow-Servant.**

It is the nondelegable duty of an employer to furnish its employee a safe place to work within the scope of his duties, and upon its failure to have done so it may not escape liability to its employee for an injury directly and proximately caused by its negligence upon the ground that the place was unsafe owing to the negligence of a fellow-servant, when the injured employee, the plaintiff in the action, was without contributory fault.

2. **Same—Evidence—Contributory Negligence—Nonsuit.**

Evidence tending to show that the plaintiff was injured by the breaking of a plank used as a scaffold upon which he was required to work as a carpenter, under the direct orders of the defendant's vice-principal, that the plank suddenly and unexpectedly broke because of the knots and other defects therein negligently selected by a fellow-servant, and which the plaintiff owed no duty to inspect and did not inspect, is sufficient to deny defendant's motion as of nonsuit.

3. Negligence—Master and Servant—Release—Contracts—Fraud—Questions for Jury—Nonsuit.

Where there is evidence tending to show that an employee's serious injury was proximately caused by the defendant employer's negligence, and that the agent of the defendant called on plaintiff at a hospital in which he had been placed for medical treatment, and in the absence of his wife and other near relatives, induced the plaintiff to sign a release without reading it to him by fraudulent representations as to its extent and scope, and under circumstances that showed that the plaintiff was not in physical or mental condition to understand its contents: *Held,* sufficient to take the case to the jury upon the question of whether the release so signed barred the plaintiff of his recovery.

4. Same—Evidence—Consideration.

Where there is evidence tending to show that the defendant obtained of its employee, injured by its negligence, a release from liability by fraudulent representations of its agent, evidence of the gross inadequacy of the consideration is properly admitted to the jury to be considered by them in determining the question of fraud.

5. Same—Burden of Proof.

Where the defendant has set up a release as a bar to plaintiff's recovery, the burden of proof is on the plaintiff to show that it was fraudulently obtained from him by the defendant's agent, when this defense is set up and relied on by him.

APPEAL by plaintiff from *Grady, J.,* at December Term, 1926, of NEW HANOVER. Reversed.

Action to recover damages for personal injuries. Plaintiff was injured by a fall, caused by the breaking of a board in a scaffold upon which he was standing, while at work as an employee of defendant. The board broke because of defects therein, causing plaintiff to fall to the floor beneath, a distance of about eight feet. Plaintiff's leg was broken by the fall; his injuries are permanent.

Plaintiff alleges that such injuries were caused by the negligent failure of defendant, his employer, to furnish and provide for him a safe place to work.

Defendant denies liability for plaintiff's injuries, alleging that said injuries were caused by the act of a fellow-servant, for which defendant is not liable.

Defendant pleads in bar of plaintiff's recovery in this action his contributory negligence, and also a release, in writing, signed by plaintiff. Defendant alleges that plaintiff thereby, in consideration of a sum of money paid to him by defendant, fully released and discharged defendant from all liability on account of his injuries resulting from his fall.

Plaintiff alleges that the execution of the release by him as alleged by defendant was procured by fraud and misrepresentations, and that therefore said release is invalid.

Plaintiff demands judgment for the amount of his damages, to wit: $20,000, less the sum of $300 paid to him by defendant at the time the release was signed, this being the amount which plaintiff alleges was agreed upon as compensation for his loss of time, due to his injuries, for twelve weeks.

From judgment dismissing the action at the close of plaintiff's evidence, as upon nonsuit, plaintiff appealed to the Supreme Court.

A. G. Ricaud, E. K. Bryan, and L. C. Grant for plaintiff.
John D. Bellamy & Sons for defendant.

CONNOR, J. The evidence offered by plaintiff tends to establish the allegations of his complaint, with respect to the cause and extent of his injuries.

On 30 May, 1925, plaintiff was at work for defendant as a carpenter. He was directed by his foreman to go up on a scaffold, which defendant had caused to be erected in the building upon which plaintiff was at work. While plaintiff and a fellow-workman were standing upon a board in this scaffold, engaged in the performance of their duties as employee of defendant, the board suddenly broke, causing plaintiff to fall a distance of about eight feet to the floor of the building.

The scaffold had been erected on the previous day, for the use of carpenters and other workmen employed in the building by defendant. Plaintiff had nothing to do with the selection of material for this scaffold, or with its construction. The board which broke while plaintiff was standing on it was selected and used in the construction of the scaffold by a fellow-workman of plaintiff, acting under the orders of his foreman. It had been used for some time about the building as a runway for wheelbarrows; it was old and dirty. The workman who selected the board and used it in the construction of the scaffold testified that it looked like a strong plank, but that he did not take much pains in selecting it. There were two knots on the under-side of the board, which was sixteen feet long, ten inches wide, and two inches thick. These knots were about the middle of the board, and extended continuously to its outer edges. The board broke right at the knots.

The scaffold containing this board was constructed by defendant as a place for its employees to stand while at work on the beams overhead. The defendant owed to its employees who were directed to work on this scaffold the duty to exercise due care in selecting materials reasonably suitable and safe for its construction. If defendant delegated to one of its employees the performance of this duty, it is responsible for the manner in which such employee performed the duty delegated to him; defendant is liable to plaintiff, if a breach of its nondelegable duty with respect to the place at which he was directed to work was the proximate cause of his injuries. It is not relieved of such liability because its employee who selected the board and constructed the scaffold was a fellow-servant of plaintiff. *Barkley v. Waste Co.,* 147 N. C., 585.

In *Fowler v. Conduit Co.,* 192 N. C., 14, in the opinion written by *Justice Brogden,* it is said: "The principles of liability growing out of the use of scaffolds, platforms and walkways, as declared by the decisions of this Court, are as follows: (1) The employer must exercise ordinary care in selecting materials reasonably suitable and safe for the construction of such instrumentalities; (2) ordinary care must be exercised in the construction and inspection thereof; (3) if the employer delegated the construction of such instrumentalities to one of his employees, he is responsible for the manner in which this duty is discharged, and the employee using such instrumentality has a right to assume that the employer has exercised due care both in the selection of proper materials and in the construction of the instrumentality."

As the result of the injuries sustained by him, when he fell, plaintiff was confined to his bed in the hospital for five weeks, during which time he suffered great pain. After he was taken to his home, he was confined to his bed there for two weeks. He then got up and moved around in a chair. He was injured on 30 May, 1925; he went back to work with defendant, at reduced wages, on 10 September, 1925, and continued to work until he was discharged on 22 April, 1926. During this time, he found it necessary to use crutches; he now uses a stick to enable him to walk. His general health, which prior to his injury was good, is now greatly impaired. He suffers pain from his injuries almost constantly. Since he was discharged by defendant, he has been unable to secure employment. He testified, "Since that time I have had no other employment. I have asked several for work, but they say 'No,' they don't want nobody. They see me on a stick, and I guess they don't want a man on a stick; they don't want me, and I guess nobody else does."

If the jury shall find from the evidence that plaintiff was injured by the negligence of defendant, as alleged in the complaint, and his recovery in this action is not barred by his contributory negligence, or by a valid release, plaintiff is entitled to recover of defendant as damages for his injuries a sum of money which the jury shall find is full and adequate compensation for all losses which he has sustained as the immediate and necessary consequences of his injuries. *Wallace v. R. R.,* 104 N. C., 442.

The defendant offered no evidence at the trial, but at the conclusion of plaintiff's evidence moved for judgment as of nonsuit.

Plaintiff's evidence does not show, or tend to show, that he contributed by his own negligence to his injuries, and that he is thereby barred of recovery in this action should the jury find that he was injured by the negligence of defendant, as alleged in the complaint.

The plaintiff was taken to a hospital immediately after he was injured. With respect to the execution by him of the release relied upon by defendant as a bar to his recovery, plaintiff testified as follows: "On the fourth day after I went in there, Mr. Lewis came. I was asleep when he came in. When I woke up, he was standing at the foot of the bed, smiling. He walked around the side of the bed and said he had a paper he would like to have me sign, so that he could pay Dr. Bullock, as he had to pay him in advance. He did not ask me if I wanted to read the paper—he just asked me if I wanted to sign it. I told him I reckoned so, if I could. I could not raise anything but my head. I could not raise my body on account of the cast. Mr. Lewis said that signing the paper would not interfere with my suing the company in case I was injured for life. He made figures, showing for what I was signing. These figures show, 'For Dr. Bullock, first aid, $35; room and board for five weeks, $192.50; charge for Dr. Bullock, $50, and my time, $300.' He said, 'We have agreed to give you half-time for twelve weeks, as the job will be finished in that time; this amounts to $267.10, but we will make it $300.' He gave me a check for $300, and I signed the paper. I relied upon his representation as to what the paper said. I did not read it. I had no money; I had to pay rent and support my family. I am a married man. I knew what I was doing when I signed the paper. My mother was in the room when Mr. Lewis came in. She remained there. Two nurses came in and signed the paper as witnesses. My wife was not there. Only my mother, the two nurses and Mr. Lewis were in the room with me when I signed the paper. I do not know whether I was under the influence of drugs or not. I had taken some the night before. They had been giving me drugs all along. I know what Mr. Lewis told me I was doing when I signed the paper and took the check for $300. They did not read the release to me, nor did they offer to read it. Mr. Lewis asked me about the nurses. He called them to come into the room. They signed the paper and went out. I asked Mr. Lewis, in case I was ruined for life, what would happen. He said that the paper I had signed would not interfere with my suing for damages. I believed what he said."

"A release executed by the injured party, and based on a valuable consideration, is a complete defense to an action for damages for the injuries, and where the execution of such release is admitted or established by the evidence, it is necessary for the plaintiff to prove the matter in avoidance." *Aderholt v. R. R.,* 152 N. C., 411. The mere execution of a release by the injured party, however, does not preclude him from recovery of damages resulting from injuries caused by the negligence of the party relying on it, when there is evidence tending to show positive fraud, and that the injured party was deceived and thrown off his guard by false statements designedly made at the time, and reasonably relied upon by him. "There are decisions," says *Hoke, J.*, in the opinion for the Court in *Gray v. Jenkins,* 151 N. C., 80, "here and elsewhere, directly holding that false assurances and statements of the other party may of themselves be sufficient to carry the issue to the jury when there has been nothing to arrest attention or arouse suspicion concerning them. *Walsh v. Hall,* 66 N. C., 233; *Hill v. Brower,* 76 N. C., 124; *May v. Loomis,* 140 N. C., 350; *Griffin v. Lumber Co.,* 140 N. C., 514."

It is the policy of the law, as evidenced by many decisions of this Court, in order to protect the weak from oppression by the strong, and to give ample assurance that justice shall be done to those whose need is great, to scrutinize releases executed by injured employees and relied upon by employers to bar recovery of adequate sums of money as damages resulting from injuries caused by negligence.

In *Bean v. R. R.,* 107 N. C., 732, *Merrimon, C. J.*, affirming the judgment of the Superior Court in favor of plaintiff, notwithstanding a release signed by him, says: "Granting that there was no positive fraud on the part of defendant or its agents (none was alleged), there was evidence to prove, and the jury found, under appropriate instructions from the court, not objected to, that the plaintiff executed the release by mistake, occasioned by his ignorance, physical pain, mental anxiety, and lack of capacity, under the circumstances, to understand and comprehend the nature and purpose of such release. . . . As we have said, the plaintiff does not allege, in the reply, positive fraud of the defendant, nor mutual mistake, nor undue influence, nor simple weakness of understanding. He alleges such a combination of facts and circumstances, and produces evidence to prove the same, as show such mistake and surprise on his part as entitled him to have the release declared inoperative and void."

In *Boutten v. R. R.,* 128 N. C., 337, a judgment dismissing the action as in case of nonsuit was reversed. In the opinion of this Court it is said: "There is both allegation and proof that the plaintiff is ignorant and unlettered, unable to read or sign his name; that the paper was not read over to him; that he was in physical suffering from his wounds; that the man at whose house he was staying during his confinement from his wounds told him the paper was to enable him to get his pay from the railroad company for his taking care of the plaintiff while wounded, and that under the impression it was a paper of that kind, he signed it, but he did not know that it was a release of his claim for damages against the company, and that no consideration was ever paid to him to give such release. . . . It does not appear that even the board and nurse here have been paid, but if they had been, such payments might be taken into consideration in adjusting a reasonable sum to be paid to plaintiff for his injuries if sustained by the negligence of defendant. Payment of the nurse's bill, had it been shown, would have been no recompense to plaintiff for injuries of the nature here in evidence."

In *McCall v. Tanning Co.,* 152 N. C., 649, a new trial was ordered by this Court for error in an instruction to the jury upon the issue involving the allegation that a release relied upon by defendant was procured by fraud. In the opinion it is said: "There was evidence on the part of plaintiff tending to show that plaintiff had been injured by defendant's negligence, and that while he was still suffering pain and anxiety from his hurt, he was sent for by J. S. Silverstein, vice-president and general manager of defendant company, and was induced to sign the release in question by false and fraudulent representations on the part of said Silverstein to the effect that the release in question was a receipt to enable Silverstein to obtain an amount of insurance arising by reason of the injury, and that same had no bearing on his claim for damages. If such representations were made under circumstances calculated to mislead him, the effect under the doctrine referred to would be to avoid the release, whether plaintiff at the time had mental capacity to understand it or not."

In *Brazille v. Barytes Co.,* 157 N. C., 454, plaintiff recovered damages for personal injuries caused by the negligence of defendant. Among other defenses, defendant relied upon a release executed by plaintiff. It excepted to the refusal of the court to instruct the jury to answer the issue as to fraud in obtaining the release in the negative. Upon its appeal to this Court, the assignment of error based upon this exception was not sustained. In the opinion it is said: "There was evidence tending to show fraud, which was sufficient, if believed by the jury, to justify the finding of the issue in the affirmative. There was evidence that the plaintiff's wife and brother were not permitted to be present in the office when the release was signed, but were kept outside in the cold; that the release was executed within a few days after the plaintiff left the hospital and while he was suffering great pain and mental anxiety occasioned by his injuries; that plaintiff was ignorant and unable to write, blind, and his hearing badly impaired; that, as he testified, he thought he was giving a receipt for his wages; that he had no friends or counsel to advise him; that the consideration paid was $372; whereas the jury found that $4,850 was reasonable and just compensation.

"These and other circumstances were sufficient to carry the case to the jury. *Hays v. R. R.,* 143 N. C., 128; *Dorsett v. Mfg. Co.,* 131 N. C., 259; *Bean v. R. R.,* 107 N. C., 746."

In *Styron v. R. R.,* 161 N. C., 78, defendant excepted to the refusal of the court to allow its motion at the close of all the evidence for nonsuit. Defendant relied upon a release executed by plaintiff in consideration of the sum of twenty-five dollars. The jury found that plaintiff was injured by the negligence of defendant, and assessed her damages at $325. This Court found no error in the trial. In the opinion it is said: "The plaintiff testified that she is ignorant and cannot read or write; that the release was not read over to her; that the officials told her she had no claim against the town, and that she made her mark; that $16 of the $25 was paid to the doctor, and that she received only $6 in cash, and that $2 went to pay some money that had been loaned to her."

In *Causey v. R. R.,* 166 N. C., 5, defendant earnestly insisted that there was no evidence of fraud or undue influence. This Court found no error in the trial in the Superior Court, at which judgment was recovered by plaintiff for damages assessed by the jury for personal injuries caused by defendant's negligence. The jury found that plaintiff had sufficient mental capacity to understand the nature and effect of the release executed by him, but that the execution of said release was procured by fraud and undue influence of defendant. *Justice Allen,* in the opinion of the Court, says: "No presumption of fraud arises from the relation of employer and employee, but it is recognized by the courts that the employer has great influence in determining the conduct of the employee, and may use it to his injury. *King v. R. R.,* 157 N. C., 63." He says: "We have, then, a full release executed upon the payment of less than one-third of the amount agreed to be paid, and when the most important element of damages was not then taken into consideration—mental and physical suffering and reduced capacity. It was executed by an employee, who was at the time suffering mentally and physically from his injury, and who wished to retain his place with the defendant, and when no one was with him except the claim agent of defendant, who made contradictory statements about his meeting with the intestate. It would seem that one of two conclusions must follow, if the jury accepted this evidence: that the intestate did not have sufficient mind to execute a release, or that he was improperly influenced. The jury has adopted the latter solution, and in our opinion there was evidence to support it."

In *Knight v. Bridge Co.,* 172 N. C., 393, the rule with respect to the adequacy of the consideration for a release of a claim for damages is stated as follows: "The owner of tangible property, or of a claim for damages, may give it away or sell it for less than its value, and the contract is valid in the absence of fraud, undue influence, or oppression; but if the contract is attacked as fraudulent, the inadequacy of consideration is evidence of fraud, and if gross, is alone sufficient to carry the case to the jury on the issue of fraud."

In *McMahan v. Spruce Co.,* 180 N. C., 637, it was held, upon appeal to this Court, that the motion for nonsuit in the Superior Court was properly overruled. There was evidence of fraud in procuring the release, and of a want of consideration. "There was actual misrepresentation here, notably as to the plaintiff's condition, which was calculated to mislead him and cause him to surrender his right of recovery for a mere song, almost nothing, as compared with the extent of his injuries and his real damages."

Upon the authority of these and of other decisions of this Court, it must be held that the evidence offered by plaintiff, to show matters in avoidance of the release, should have been submitted to the jury.

As to whether plaintiff in this action is precluded from attacking the release, because, although able to read it, he failed to do so, or because he failed to require that it be read to him, should be submitted to the jury as a circumstance to be considered by them in determining their answer to the issue. A person who can do so is ordinarily required to read a paper before signing it, or, if he cannot read, he is required to request that it be read to him. *Colt v. Kimball,* 190 N. C., 169. This rule does not apply, however, in case of positive fraud, or false representation, made by another party, by which the person signing the paper is lulled into security or thrown off his guard and prevented from reading it and induced to rely upon such false representation or fraud. Nor does it apply in such cases where the person signing the paper is unable to read, and fails to request that it be read to him, when the other party who relies upon the paper states its purpose and effect, and the person sought to be bound thereby reasonably relies upon such statement, and therefore fails to request that it be read to him. The exceptions to the rule have been recently discussed by *Clarkson, J.,* with full citation of authorities, in his opinion in *Oil and Grease Co. v. Averett,* 192 N. C., 465.

There was error in allowing defendant's motion for nonsuit at the close of plaintiff's evidence, and in dismissing the action. The judgment is

Reversed.

CORNELIA T. JESSUP AND JOSEPH T. NIXON v. THOMAS NIXON ET AL.

(Filed 27 April, 1927.)

Estates—Wills—Contingent Remainders—Vested Interests—Descent and Distribution.

A devise of an estate to the widow of the testator's son during her life, "but in case she dies the property to go to her surviving children": *Held,* the estate goes to such children surviving the widow or tenant for life, and where her son dies during its continuance his heirs at law cannot claim under him by descent.

APPEAL by plaintiffs from *Grady, J.,* at August Term, 1926, of PERQUIMANS.

Controversy without action on an agreed statement of facts. Francis Nixon, Sr., died on 26 November, 1887, at the age of 89 years, leaving a last will and testament dated 27 July, 1887, which was duly admitted to probate on 30 November, 1887. The second item, as drafted, was as follows:

"I give to my son Thomas Nixon the plantation whereon he now lives, containing about 275 acres, more or less, and in the event of his death before that of his wife, Cornelia, I loan the use of the plantation to her during her life or widowhood, but should she marry, I give the lands to the surviving children of Thomas Nixon and Cornelia. See deed of R. F. Overman, assignee of the same. This includes piece of land on north side of Henby Road."

Lines were drawn across this item, and it is contended that it was canceled by the testator after the death of his son Thomas.

Item 14 is in these words:

"I give to Cornelia Nixon, widow of Thomas Nixon, the sum of two thousand dollars in cash in full of my estate. I also give to Cornelia Nixon, the widow of Thomas Nixon, the plantation whereon she now lives, containing about 275 acres, during her life or widowhood, but in case she marries or dies, the property to go to her surviving children."

Of the children of Thomas Nixon and Cornelia, his wife, viz.: Francis, Jr., Joseph T., Henry B., James W., Mary L., Harriet, and Thomas, all survived the life tenant, except Joseph T. Nixon, who, intestate and without issue, predeceased the testator on 13 January, 1885, aged 26 years, and Francis Nixon, Jr., who, intestate, predeceased the life tenant on 30 March, 1896, aged 49 years, leaving him surviving as his heirs at law the plaintiffs, aged respectively 6 and 5 years, another daughter, Kate, aged 4 years, who died intestate and without issue, on 8 August, 1913, and a posthumous child, who died intestate and without issue on 22 January, 1905. Francis Nixon, Jr., was also survived by his widow, Susan Nixon, whom he married on 6 November, 1888, and who is now living. Cornelia Nixon, the life tenant, never remarried, and died on 20 March, 1899, aged 69 years. It will be noted that, in the facts agreed, the defendants, having ascertained they could not sustain it, abandoned their plea of the statute of limitations.

The plaintiffs contend that their father, Francis Nixon, Jr., deceased, acquired under the last will and testament of the said Francis Nixon, Sr., deceased, a one-sixth undivided interest in and to the said premises described and referred to herein; or that the plaintiffs, together with their deceased sisters, whose heirs at law they are, acquired such interest under said will, and that by reason thereof they are now, together with that certain undivided interest, which admittedly they own by inheritance through James W. Nixon, the owners, and entitled to the possession of a one-fifth undivided interest in and to the said lands.

The defendants, on the other hand, contend that neither the plaintiffs nor their father, Francis Nixon, Jr., acquired any interest in said land under the said last will and testament of said Francis Nixon, Sr., deceased, and that the plaintiffs are the owners only of that certain undivided interest acquired by inheritance from James W. Nixon.

It was agreed that if upon the facts the court was of the opinion that, under the terms of said will and testament, the plaintiff's father, Francis Nixon, Jr., or the plaintiffs, together with their deceased sisters, acquired a one-sixth undivided interest in and to said lands, then the court shall adjudge that the plaintiffs are now the owners of the one-fifth undivided interest therein; if the court be of the opinion that neither plaintiffs' father, Francis Nixon, Jr., nor the plaintiffs, and their deceased sisters, acquired such one-sixth interest under and by virtue of the terms of said will and testament, then the court shall adjudge that the plaintiffs are the owners of that certain undivided interest in and to said lands, acquired by inheritance from James W. Nixon alone.

It was adjudged that the plaintiffs took nothing under the will of Francis Nixon, Sr., and that they are the owners of a one-twenty-fifth undivided interest in the lands described in the complaint. The plaintiffs excepted and appealed.

Ehringhaus & Hall and McMullan & LeRoy for the appellants.

Whedbee & Whedbee, Thompson & Wilson, Ward & Grimes, and Stephen C. Bragaw for defendants.

ADAMS, J. The fourteenth item of the will contains this devise: "I also give to Cornelia Nixon, the widow of Thomas Nixon, the plantation whereon she now lives, containing about 275 acres, during her life or widowhood, but in case she marries or dies, the property to go to her surviving children." Thomas Nixon died in June, 1886; Cornelia, in March, 1899; and Francis Nixon, Jr., father of the plaintiffs, in March, 1896. The plaintiffs contend that their father, a son of Thomas and Cornelia Nixon, acquired under the will of Francis Nixon, Sr., a one-sixth undivided interest in the devised premises, and that upon his death they succeeded to his interest; the defendants say, on the other hand, and as Francis Nixon, Jr., predeceased the life tenant he acquired no interest in the property, and the plaintiffs none as his heirs at law. The question is whether, under the provisions of the will, "her surviving children" are to be ascertained at the death of the testator or at the death of the life tenant—the rule whereby the period of vesting is to be determined being a rule of construction and not a principle of substantive law. *Taylor v. Taylor,* 174 N. C., 537.

A brief review of some of the authorities in which the question has been discussed may serve in pointing to the correct conclusion. Among the earlier cases is *Cripps v. Wolcott,* 56 Eng. Reports, 613, which was decided in 1819. In this case it appears that Deborah Saunder devised certain real and personal property in trust to pay to or to permit her husband to enjoy the rents and profits thereof during his natural life, and directed that upon his death a sum of money and other personal property should be equally divided between her two sons and her daughter, and the survivors or survivor of them, share and share alike. In construing this clause, the *Vice Chancellor* said: "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer v. Phillips.* But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy. This is the principle of the cited cases of *Russell v. Long, Daniell v. Daniell,* and *Jenour v. Jenour.* In *Bindon v. Lord Suffolk,* the House of Lords found a special intent in the will that the division should be suspended until the debts were recovered from the crown; and they referred the survivorship to that period. The two cases of *Roebuck v. Dean* and *Perry v. Woods* (3 Ves., 204), before *Lord Rosslyn,* do not square with the other authorities. Here, there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous life estate."

It has been said that although this seems to have been at the time a very bold decision, yet the rule of construction therein propounded is so reasonable and convenient for general application that it is not surprising that subsequent judges have been favorably disposed to its adoption. 2 Jarman on Wills (6 ed.), 2229. Certain decisions made it doubtful whether the rule applied to devises of real estate, but no satisfactory ground was discovered for restricting it to personal property, and the question was finally adjudicated in *Re Gregson's Trusts,* 71 Eng. Reports, 559. There Gregson devised all his freehold estates to his wife for life, which after her decease was to be "shared share and share alike among the following persons"—whose names were given. It was decided that a strained construction should not be put on the words in order that the remainder by early vesting might escape the inconveniences of tenure incident to contingent remainders, and that survivorship should be referred, as in case of personal property, to the death of the tenant for life. 2 Jarman, 2131.

A majority of the American courts seem to have adopted this rule, and our own decisions have favored it as indicating the more reasonable construction. In *Biddle v. Hoyt,* 54 N. C., 160, there was a bequest of personal property to Joseph Brickett and his wife for their joint lives, and to the survivor for life, and upon their death to their children, "to be equally divided between them, or the survivor of them, their heirs and assigns forever." At the death of the testator they had three children, two of whom died in the lifetime of the surviving life tenant: Joseph without issue; Sarah, wife of John Norcott, leaving a child, who died without issue in the lifetime of the grandmother. Martha, the other child, married Gould Hoyt, and was living when the life tenant died. The question was whether the bequeathed property was vested in the three children, so that upon the death of two of them in the lifetime of the mother their interests devolved upon their respective representatives, or whether it was suspended during the life of the surviving life tenant and vested in Martha, the surviving wife of Gould Hoyt. It was held that the surviving child was entitled to the whole interest. In the opinion it is said that the rule established in *Cripps v. Wolcott, supra,* and approved in *Hilliard v. Kearney,* 45 N. C., 221, removed all hesitation in deciding the case in favor of the surviving child. So, in *Vass v. Freeman,* 56 N. C., 221: "But though it is an established rule that where there is a bequest simply to A., and in case of his death, or if he die, then to B., A. will take absolutely upon surviving the testator (*Longfield v. Stoneham,* 2 Strange's Rep., 1261; *Trotter v. Williams,* Pre. in Chan., 78), yet where there is another point of time to which such dying may be referred, as is obviously the case when the bequest is to take effect in possession at a period subsequent to the testator's decease, the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession. See *Harvey v. McLaughlin,* 1 Price's Rep., 264; *Home v. Pillans,* 2 Myl. and Keen's Rep., 24. Thus it will be seen that, whether in the case of survivorship or in that of a bequest to one person with a limitation over, where the death of the legatee is spoken of as an uncertain event, it can be so only in reference to some other event, and that the death of the testator must, of necessity, be assumed as the event referred to when no other is mentioned in the will. But even where there is no subsequent time to which the death of the legatee, spoken of as contingent, can be referred, and where the bequest is immediate, special circumstances will induce the Court to construe it to mean the death of the legatee at any time, and not restrict it to the death of the testator."

These cases may be regarded as decisive of the present appeal if the principle they enunciate is applicable under our decisions, as it is in the later English cases, to a devise of real property. That some of our decisions have applied it to real property is not to be doubted. Without pausing to analyze various devises in which the principle is impliedly approved, we may refer to cases in which the point has been directly presented. By reference to the record, it will be seen that the maker of the deed construed in *Bradshaw's case* conveyed the land "to his wife to her sole use and benefit during her natural life, to have and to hold, and at her death to the surviving children" of the grantor and the grantee. The Court said that the term "surviving children" meant children living at the death of the life tenant. *Bradshaw v. Stansberry,* 164 N. C., 356. The appellant suggests that as the appeal in that case was dismissed for failure to print the record and briefs, it is not likely that the question received the consideration usually accorded by a full Court; but the force of this criticism is impaired by the Court's reannouncement of the principle and its subsequent citation and approval of the decision. *Taylor v. Taylor, supra.*

In the *Mercer case* the devise was as follows: "I give and devise to my beloved wife, Rosa M. Mercer, the tract of land on which I now reside, containing five hundred acres, more or less, for her lifetime, and at her death to go to our surviving children or their heirs." *Brogden, J.,* who wrote the opinion, said that the persons entitled to the estate are to be determined as of the death of the life tenant. True, the will was interpreted as creating substitute or alternate remainders, but the opinion approves the principle laid down in the *Bradshaw* and *Taylor cases* in these words: "Indeed, the prevailing rule seems to be that if an estate is given by will to the survivors of a class, to take effect on the death of the testator, the word 'survivors' means those living at the death of the testator; but if a particular estate is given and the remainder is given to the then survivors of a class, the word "survivors" means those surviving at the termination of the particular estate." *Mercer v. Downs,* 191 N. C., 203. See *Fulton v. Waddell, ibid.,* 688.

This statement accords with the general rule that words of survivorship in a will, particularly when used in connection with a general gift, refer to the death of the testator as the time at which the survivorship will be determined, unless it is made to appear that the testator intended to refer it to a time after his death; but when the gift to the survivors is preceded by a particular estate for life or years, words of survivorship, in the absence of anything indicating a contrary intention usually refer to the termination of the particular estate. 40 Cyc., 1511; *Hilliard v. Kearney, supra; Biddle v. Hoyt, supra.*

The appellants cite *Haughton v. Lane,* 38 N. C., 627, as direct authority in support of their position. It will be noted, however, that no definite period was fixed at which the devise should take effect; it therefore vested in the daughters, or such of them as were alive at the death of the testator, but not to be enjoyed until the death of their mother. In the case before us, the gift in the second or canceled item was to Cornelia during her life or widowhood, but should she marry, to the surviving children of Thomas Nixon and Cornelia; in the fourteenth item, to Cornelia during her life or widowhood, but in case she marries or dies, to her surviving children—that is, her children who were living at her death.

After giving to the argument and the briefs our careful consideration, we conclude that the judgment of the lower court should be

Affirmed.

H. T. DAVENPORT v. W. L. VAUGHN, TRUSTEE, AND N. L. SIMMONS.

(Filed 27 April, 1927.)

1. **Mortgages — Deeds in Trust — Trusts — Negligence of Trustee — Damages.**

The trustee in foreclosing a deed of trust given to secure notes for borrowed money, as agent for the debtor and creditor, is charged with the duty of fidelity and impartiality to each, and is required by law to exercise good faith and every requisite degree of diligence in making the advertisement and giving notice of sale, and it is incumbent on him to make every reasonable effort to ascertain the mortgage indebtedness when the instrument secures notes in series, and if through haste, imprudence or want of diligence his conduct has caused the advance of the interest of one of the parties to the injury of another, he is personally liable therefor to the latter.

2. **Same—Forged Instruments—Statutes—Negligence.**

Where the foreclosure of a deed in trust securing notes in series has been advertised and sale made without the knowledge of the trustee, and he has refused to execute the deed to the purchaser at the foreclosure sale when called upon to do so because of an outstanding note in the series remaining unpaid and unaccounted for in the hands of a holder for value, he is not justified in accepting from the purchaser a note forged by him and executing the deed (C. S., 3003), without further inquiry, and such purchaser may recover from him to the extent of his loss; and the negligence, if any, of such holder in not notifying him that his note had not been paid, will not affect the result.

APPEAL by defendant Vaughn from *Nunn, J.*, at November Term, 1926, of TYRRELL.

The plaintiff brought suit to recover an amount alleged to be due him as the holder in due course of a note executed by J. F. Leppard to H. B. Smith, and secured by a deed of trust to W. L. Vaughn. The only pleadings are the complaint and Vaughn's answer. Simmons neither answered nor demurred.

The case was referred, and the referee found from the evidence and reported the following facts:

1. That on 1 April, 1920, one J. F. Leppard executed to W. L. Vaughn, trustee, a deed of trust securing eight notes in the sum of $2,000 each, payable to H. B. Smith, and due and payable one each on 1 December, 1921, 1922, 1923, 1924, 1925, 1926, 1927, and 1928, said notes being in series, numbered 1 to 8, inclusive, said deed of trust being duly registered in the office of register of deeds of Beaufort County, in Book 221, page 335 (plaintiff's Exhibit C).

2. That thereafter, to wit, on 21 March, 1921, the plaintiff, H. T. Davenport, became the holder in due course of the sixth note of said series of eight (plaintiff's Exhibit A). That said note of $2,000, No. 6 of the series of 8, was deposited with the plaintiff by A. A. Paul, said Paul being the holder thereof in due course, as collateral security for a note of $1,000, dated 21 March, 1921, due one year after date, and executed by said A. A. Paul to plaintiff, H. T. Davenport (plaintiff's Exhibit B).

3. That some time prior to 27 March, 1922, the Washington-Beaufort Land Company, of which said company the defendant, N. L. Simmons, was president and general manager, became the owner by assignment of the 8 notes of $2,000 each, secured by the deed of trust above referred to; the one note of $2,000, No. 6, of the series of 8, assigned by A. A. Paul, was then in possession of plaintiff Davenport as collateral for note of $1,000 due said Davenport by A. A. Paul, which said one thousand dollar indebtedness was assumed by said land company. That plaintiff Davenport was notified by N. L. Simmons of the assignment of said note No. 6 of the series of 8 by A. A. Paul to Washington-Beaufort Land Company. That said notice was given after the sale by Vaughn, trustee, which said sale is hereinafter referred to, and that said Davenport had no knowledge of said sale by Vaughn, trustee, at the time he received notice of the said assignment of said note No. 6 of the series of 8.

4. That default was made in the payment of the notes secured by deed of trust to W. L. Vaughn, trustee, and the said N. L. Simmons caused the property conveyed in said deed of trust to be duly advertised for sale in the manner as prescribed by law in the name of said W. L. Vaughn,

trustee. That said Vaughn, trustee, had no knowledge of said advertisement at or during the time of advertisement. That said N. L. Simmons caused sale of said property to be conducted by Mr. Harding, and had one John Mayo to buy over said land in said Simmons' name at the price of $8,000. That said Vaughn, trustee, had no knowledge of said foreclosure sale at the time of said sale.

5. That said Simmons caused a deed from W. L. Vaughn, trustee, to said Simmons to be prepared and tendered said deed to said Vaughn, trustee, for execution; that Vaughn, trustee, demanded Simmons to exhibit the notes secured by deed of trust under which foreclosure sale was made; that said Simmons exhibited seven of said notes, and represented to Vaughn that he, Simmons, owned all of said notes, and had misplaced or lost one of them, No. 6, of the series of 8; whereupon, Vaughn, trustee, refused to sign said deed.

6. That later said Simmons exhibited to Vaughn, trustee, a note purporting to be note No. 6 of the series of 8, representing to Vaughn that after further search he had found said note in his files. That Vaughn, trustee, believing and relying on the statement of Simmons, who had heretofore borne a good reputation, executed said deed. That no money was paid to Vaughn, trustee, as a consideration for said deed. That the note exhibited by Simmons to Vaughn, trustee, purporting to be note No. 6 of the series of 8 was a forged note, forged by N. L. Simmons; that said Vaughn, trustee, at the time of execution of said deed, had no knowledge that said Davenport was the holder of note No. 6 of the series of 8.

7. That plaintiff Davenport had no knowledge of said foreclosure sale, and about two years after said foreclosure sale said Davenport, still being ignorant of said sale, went to see Simmons relative to collecting his note, and requested that the deed of trust be foreclosed; that Simmons assured Davenport that the security was ample, and that he, Simmons, would soon pay him the amount due on the A. A. Paul note, and further advised Davenport that it would not be wise to foreclose at that time. That said Simmons promised said Davenport that said deed of trust would not be foreclosed without first letting plaintiff know about it. That said Simmons thereafter, during March, 1924, caused to be paid to the plaintiff, to be credited on the A. A. Paul note, various sums, aggregating $680.

8. That the deed from W. L. Vaughn, trustee, to N. L. Simmons was executed 8 April, 1922, and is recorded in the office of register of deeds of Beaufort County, in Book 237, page 251 (plaintiff's Exhibit D).

9. That plaintiff had no knowledge of advertisement of foreclosure, or of foreclosure sale, until 1 January, 1925, when he first learned of same

from inspection of the records in the office of the register of deeds, at which time plaintiff inquired of Vaughn, trustee, if foreclosure sale had been made, and said Vaughn, trustee, would neither admit nor deny that he had foreclosed the deed of trust and made deed to Simmons.

10. That summons in this cause was duly issued out of the Superior Court of Tyrrell County on 14 May, 1925.

Upon these facts the referee concluded as matters of law that the plaintiff's cause of action was not barred by the statute of limitations, and that the plaintiff was entitled to recover of the defendants $1,000, with interest from 8 April, 1922, less a credit of $680 as of 21 March, 1924.

Vaughn filed exceptions which were overruled in the Superior Court. Judgment was given for the plaintiff in accordance with the report, and Vaughn excepted and appealed.

Aydlett & Simpson for plaintiff.
Ward & Grimes for defendant Vaughn.

ADAMS, J. A. A. Paul executed and delivered to the plaintiff his promissory note in the sum of one thousand dollars, to secure which he, as a holder in due course, assigned to the plaintiff in due course as collateral a note for $2,000, executed by J. F. Leppard to H. B. Smith on 1 April, 1920. The latter was the sixth of a series of eight notes, in the aggregate sum of $16,000, given for the purchase of land, and secured by a deed of trust executed by Leppard to W. L. Vaughn. The Washington-Beaufort Land Company, of which the defendant Simmons was president, obtained an assignment of these eight notes—the note set out in the complaint, the sixth of the series, assigned by Paul, being then in possession of the plaintiff, who had no notice of the assignment before the alleged foreclosure. Default was made in the payment of the notes, and Simmons caused the land to be advertised for sale in the name of the trustee. Vaughn had no knowledge of the advertisement; no knowledge of the sale at the time it was made. Simmons prepared a deed naming himself as grantee and Vaughn signed it under the circumstances appearing in the fourth, fifth, and sixth findings of fact.

The first question relates to the measure of the trustee's duty in foreclosing the deed of trust and conveying the land. As the agent of the debtor and the creditors he was charged with the duty of fidelity as well as impartiality; of good faith and every requisite degree of diligence; of making due advertisement and giving due notice. When the sale was made, he was bound to inquire for the debts made payable out of the fund, though, said *Chief Justice Ruffin,* it may have been enough to inquire for them according to the description given in the deed. If through haste, imprudence, or want of diligence his conduct was such as to advance the interest of one person to the injury of another, he became personally liable to the injured party. *Johnston v. Eason,* 38 N. C., 330; *Allmand v. Russell,* 40 N. C., 183; *Hinton v. Pritchard,* 120 N. C., 1.

According to the facts as set forth by the referee, the trustee knew nothing of the advertisement or the foreclosure until some time after the sale had been made, and afterwards, at a time when apparently he had occasion to doubt and reason to scrutinize the proceeding, he executed a deed to Simmons upon his bare representation that a forged note, which was wholly inoperative (C. S., 3003), was in fact the note held by the plaintiff. Waiving the question of bad faith, the facts exhibit a degree of negligence and want of prudence which fully justify the referee and the judge in their conclusions of law.

It is insisted that the plaintiff, also, was negligent in declining to inform the trustee that he was the holder of the note, and that his laches should bar his recovery; but the plaintiff's silence did not relieve the trustee of exercising due diligence to ascertain the holders of the several negotiable notes which were secured by the deed of trust. *Allmand v. Russell, supra.*

It is further contended by the defendant that the plaintiff can have no recovery against Vaughn until it is made to appear that Paul cannot pay the note held by the plaintiff, and that the land cannot be resold. As to the sale, Vaughn's ratification of it hardly leaves him in a position to ask that it be reopened; and the referee's report shows that the plaintiff was a holder of the note in due course, and had it in his possession at the time of Paul's purported assignment. It is not easily perceived how Paul's assignment could adversely affect the plaintiff's title; and the plaintiff's right to bring suit on the collateral cannot be doubted. *Bank v. Hill,* 169 N. C., 235. The real basis of the action, however, is the defendant's negligent failure to protect the plaintiff's interest; and as default has been made in the payment of the note, and there is no allegation in the answer and proof that the debt due the plaintiff by Paul has been paid, we discover no sufficient reason for holding that the action cannot be maintained. *Bank v. Hill, supra; Bank v. Northcutt,* 169 N. C., 219.

The judgment is
Affirmed.

J. G. HUGHES v. R. G. LASSITER & COMPANY.

(Filed 27 April, 1927.)

1. **Roads and Highways—State Highways—Detours—Safe Condition—Contracts—Signs.**

   The statutory requirement that detours from the State highway where roads are being constructed or repaired shall be kept reasonably safe for public travel and the place thereof marked with specific signs or barriers to notify the traveling public of the menace is mandatory, and where a contractor with the State Highway Commission has expressly agreed in his contract for a particular road to observe these statutory requirements, such contractor is liable in damages to one traveling on the public highway, who was injured in having his car wrecked, as the proximate cause of the contractor's negligence therein.

2. **Same—Evidence—Questions for Jury—Nonsuit.**

   Evidence held sufficient in this cause to take the issue of defendant contractor's liability to the jury under its express provisions in his contract with the State Highway Commission, which tends to show that the defendant contractor was constructing a certain part of the State highway where it crossed a dangerous place on a railroad track, and had not barricaded the highway at the detour or placed there the required signs. and that the plaintiff driving his car using the detour indicated by the defendant's employee at the place, had carefully approached the railroad track to cross it, having safely passed there the morning of the same day, and the car was injured by a certain imperfection since occurring, and defendant's motion as of nonsuit was properly denied.

APPEAL by defendants from *Midyette, J.*, and a jury, at October Term, 1926, of ROBESON. No error.

The facts in substance:

The defendants, Robert G. Lassiter & Company, had a contract with the State Highway Commission to construct a hard-surfaced road between Aberdeen and Pinehurst, part of State Highway System Route 70. Plaintiff lived at Parkton, and on 9 December, 1925, about daylight, started in a seven-passenger Buick automobile, sitting on the front seat with his nephew driving, an experienced automobile driver, and two others, to go to a village the other side of Albemarle, on business. They came by Raeford and reached Aberdeen about 7 o'clock in the morning, crossed the railroad and bridge and came to crossroads—one leading to the left (No. 50) and one to the right (a continuance of No. 70), which they kept. They saw no notice by barricade, detour signs, or otherwise, that the road was closed to traffic. "At the forks of the road there was no barricade, we passed on through, nothing there to tell" that the road was closed to the public. Saw no sign. They traveled this road some three miles the other side of Aberdeen and drove up within 200 or 300 yards of a road machine in the road, concreting going on. They were directed—"a highway or construction man or employee instructed us to go the detour around the work. . . . When I stopped the car I received instructions to go back about 200 yards and detour. An employee of the force gave me that instruction. I didn't know that he was an employee. He drove up in a highway-colored car they used; got out of the car; he saw us coming up and we stopped, and he pointed back about 200 yards and told us to go around that way. We turned around as we were instructed, crossed over the railroad, turned down a wagon road about half a mile, and crossed back on a crossing where the traffic was crossing. . . . There were cars passing that way, and we followed the trail of the other cars." They came back about five o'clock in the evening the same route, and "On our return we undertook to cross the railroad and make the same detour, and as our car rolled over the second track of the railroad, the wheel ruts were cut so deep in the sand, the wheels fell down and the bottom of the engine fell on the T-iron and broke the engine all to pieces. . . . Traffic during the day was so great over this crossing, the sand just cut deeper, I suppose, and holes between the crossties, no timbers or anything there to keep the wheels from falling down between the ends of the crossties at all, and when my car rolled over into the hole between the ends of the crossties, the car didn't clear itself and dropped on the engine." In going up on the crossing they could not observe that the car would sink down in the sand. As they came back in the afternoon where the injury to the car occurred no instructions by signs whatever were given, only had what was given them that morning. Saw no detour signs in Pinehurst as they came back. "I account for the damage to the car on account of the railroad crossing not being properly fixed. Apparently the crossing was a temporary one. Several cars passed while we were there waiting to be pulled into Aberdeen." There were numerous cars and trucks going along the road. Some six or eight passed after they were wrecked. There was no protection against the T-iron, no boards or anything at all. The automobile driver came up "easy on the track; he was as careful a driver as I ever saw." The construction job was started the latter part of May, 1925; the work was being done the entire balance of the year.

Plaintiff offered in evidence the contract between the State Highway Commission and the defendant Robert G. Lassiter & Company, particularly that part reading as follows:

"19. *Detours—Public Convenience and Safety.* The contractor shall, at his own expense, build and maintain in good condition such detours, including crossings over pavements, as in the opinion of the engineer may be necessary to properly care for all local traffic during the construction, so far as this project is concerned, and he shall place such explicit instructions, or signs, that the public may be properly informed as to such detours.

"The State Highway Commission shall maintain all detours for strictly through traffic.

"When a detour is used for both local and through traffic, the State Highway Commission and the contractor shall jointly build and maintain in good condition such detours, including crossings over pavements, and the entire expense for same shall be equally divided between the said State Highway Commission and the contractor.

"Section 20. *Barricades, Danger and Detour Signs.* The contractor shall provide, erect, maintain, illuminate, and finally remove all barricades, danger and detour signs necessary to properly protect and direct traffic. Projects closed to traffic shall be protected by suitable barricades and signs, as shown on the sheet of standards. All barricades and signs, including detour signs, shall be illuminated at night. The contractor will be held responsible for all damage to the project due to failure of the signs and barricades to properly protect the work from traffic, pedestrians, animals, and from all other sources, and whenever evidence of any such traffic is found upon the unaccepted work, the engineer will order that the work, if in his opinion it is damaged, be immediately removed and replaced by the contractor without cost to the State Highway Commission."

Defendants denied the material allegations of the plaintiff. Denied it was a detour road, and alleged that it was for the teams, and used for construction purposes. That suitable detours by the most practical routes were provided; that signs, etc., were put up to properly inform the public. That plaintiff was guilty of contributory negligence.

A witness for defendants testified, in part: "Where the bunch of teams went along this place you couldn't call it a road, it was too bad. There was no detour road which left a point about 200 yards from where the work was being done and went into the woods, crossed the railroad, and came back into the highway after you passed the place where the work was being done. There was no road there supposed to be used by the public. We didn't maintain a road there; we didn't mean for it to be there. There were tracks there, and we went through. I don't figure very many cars went through there. I can't say exactly how many. I could not give any idea how many; there were some. If I could give you the right idea I would. There were some cars went through there. They didn't have any business going through there." That at Aberdeen, coming from Raeford, there was a small detour sign, three or four feet square, on a telephone pole in the fork of that road showing Route 50 out to Raleigh, "and then right down in where you hit that fork after you cross the bridge there was a big detour sign, six feet square. That fork was where one road goes to Pinehurst on Route 70, and the other road goes to Raleigh. Fork of the road right after crossing the bridge, and there was a detour sign sitting in that fork; that is about 100 yards from where it is contended the plaintiff turned out on this road. This big detour sign was in Aberdeen; one was in Aberdeen, and right after crossing the bridge from Aberdeen. That is right about the limit. That is right at the fork of the road. There were big letters on that detour sign right up above; first thing said danger, road closed, under construction; the upper part of it was in red; then there was a black line pointing the way you detour. The arrow always points the way they want you to detour. Said something about under construction. The State Highway Commission put that sign there. It was right about three miles from the sign to the point where the car was wrecked. There were two signs in Pinehurst, one as you come in where the old depot was moved from. So there was one in the fork there, and then on down at Sandhill Fair Ground there was another road fork and detour sign there showing you to come by way of Southern Pines." Where the car was wrecked, "it was not maintained at all as any sort of road. It was just made there; never maintained. That is the road our teams used to go in and out; never maintained any detour like that at all. The man that was directing Mr. Hughes through there was not any of our outfit; wasn't any of our outfit there. While we were working there, the State Highway Commission had inspectors on the job all the time." Another witness testified: "The State Highway Commission put up the detour signs absolutely for through traffic detour."

Dickson McLean, H. E. Stacy, and C. W. Pridgen, Jr., for plaintiff.

Varsar, Lawrence, Proctor & McIntyre and Parham & Lassiter for defendants.

CLARKSON, J. This is an action for actionable negligence, brought by plaintiff against the defendants, for damages to a Buick 7-passenger automobile. The usual issues were submitted to a jury, and found in favor of plaintiff, and damages awarded.

The only question involved in this appeal is whether the court below committed error in refusing to grant the defendant's motion for judgment as in case of nonsuit. C. S., 567. On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

Part of the State Highway Act, 3 C. S., 3846 (s) (Public Laws 1921, ch. 2, sec. 11), is as follows: "It shall be mandatory upon the State Highway Commission, its officers and employees, or any contractor or subcontractor employed by the said commission, to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route while said highways or roads are being improved or constructed, and it shall be mandatory upon the said Highway Commission and its employees or contractors to place, or cause to be placed, explicit directions to the traveling public during repair of said highway or road under the process of construction. All expenses of laying out and maintaining said detours to be paid out of State Highway Fund."

3 C. S., 3846 (t) makes it a misdemeanor for any one, after the State Highway is closed during construction or maintenance, to injure, etc., barriers, warning signs, etc.

It will be noted that for the protection of the traveling public the statute makes it mandatory on both the State Highway Commission and the contractor while improving and constructing roads (1) to select, lay out, maintain, and keep in as good repair as possible suitable detours by the most practical route, (2) to place, or cause to be placed, explicit directions to the traveling public during repair of said highway or road under the process of construction. Recognizing this important duty for the protection of life, limb and property, the defendants entered into a contract with the State Highway Commission, and agreed to (1) "place *such explicit instructions or signs* that the *public may be properly informed* as to such detours," (2) "shall provide, erect, maintain, illuminate, and finally remove all barricades, danger signs necessary to properly protect and direct traffic. All barricades and signs, including detour signs, shall be illuminated at night."

From the evidence of plaintiff, when on his journey traveling on Route 70, from Raeford, they entered Aberdeen, saw no detour signs, and when they crossed the railroad and bridge in Aberdeen, on said Route 70, they came to the forks in the road, one leading to the left (Route 50) and the other to the right (Route 70). In the language of the witness, "there was no barricade, nothing there to tell." The door of the road, as it were, was wide open, inviting them, and they followed this road some three miles and was stopped by a man in a khaki colored car and used by the highway, and he pointed out the road to go, crossing the railroad. Cars were passing that way, and the driver followed the trail of the cars. They came back the same way that evening, and the traffic during the day over the railroad was so great that the sand was cut deeper between the rails at the place they had to cross over the railroad crossing. No timbers or anything on the crossing to keep the wheels of the automobile from falling down between the cross-ties. This condition could not be observed in going on the track and the driver "came up there easy on the track; he was as careful a driver as I ever saw." The wheels sunk in and the engine to the automobile was broken all to pieces. Some half dozen cars passed while they were waiting to be pulled in.

We think the court below, under the facts and circumstances of this case, correct in refusing to grant a nonsuit.

In the case of *Campbell v. Boyd,* 88 N. C., p. 129, Boyd owned and operated a mill; he and others built a private road connecting two public roads. The private road crossed two streams, over which bridges were built. While this route was opened mainly for the convenience of Boyd and his associates, whose lands were traversed, it was also used as well by the public, with full knowledge of Boyd and without objection from any one, in passing between the roads. The flooring to one of the bridges was sound, but the timbers underneath were in a rotten condition, known to defendant. While plaintiff was crossing the bridge with his horse, it broke and both were precipitated into the creek. *Smith, C. J.,* said, at p. 131-2, "The way was opened by the defendant and his associates, primarily, though, it was for his and their accommodation, yet permissively to the general traveling public. It has, in fact, been thus used, and known to the defendants to be thus used, with the acquiescence of himself and the others, and under these circumstances it may fairly be assumed to be an invitation to all, who have occasion thus to use it, and hence a voluntary obligation is incurred to keep the bridges in a safe condition, so that no detriment may come to the travelers. . . . The law does not tolerate the presence over and along a way, in common use, of structures apparently sound, but in fact ruinous, like man-traps, inviting travelers to needless disaster and injury. The duty of reparation should rest on some one, and it can rest on none other but those who built and use the bridges, and impliedly at least invite the public to use them also. For neglect of this duty they must abide the consequences." *Mulholland v. Brownrigg,* 2 Hawk., 349; *Batts v. Telephone Co.,* 186 N. C., p. 120; *Willis v. New Bern,* 191 N. C., 507; *Michaux v. Rocky Mount, ante,* 550; Angell on Highways, 3 ed., p. 335. 20 R. C. L., p. 65, sec. 57: "If the owner or occupant has permitted persons generally to use or establish a way under such circumstances as to induce a belief that it is public in character, he owes to persons availing themselves thereof the duty due to those who come upon premises by invitation," citing *Campbell case, supra.*

In *King v. Douglas County et al.* (Neb.), 208 N. W. Rep., p. 120: "Action to recover damages for the death of his intestate by Ludlow King, as administrator of the estate of Emma Nancy King, deceased, against the county of Douglas and Allied Contractors, Inc., for failure to properly construct and maintain a public highway extending east from Elkhorn, Nebraska, and also for failure to establish and maintain suitable barriers and warnings thereon." The Court said: "Even aside and apart from the direction given her by the employees of the contractors to proceed by the dirt highway, the entrance thereto being unobstructed by barrier or sign, presenting the appearance of a generally traveled public highway in present use, and being within the confines of a long-established road, she had a right to assume that it was reasonably safe for the accommodation of the public at large."

In *Stark v. Lancaster,* 57 N. H., p. 88, it is held (headnotes), "If a town permits a turn-out to exist from the traveled part of its highway to a private way, over adjoining land, with all the characteristic marks of a highway, it will be bound to keep such part of the turn-out as is within the laid out limits of the highway in suitable repair for the travel usually passing over it.

"Whether or not such turn-out was sufficient, whether its defective condition was the proximate cause of an accident to a team, and whether the driver was in the use of sufficient care, are all questions for the jury; and the evidence tending to show the condition of the highway, and that the accident commenced at the point where the defect was alleged to have existed, although the injury was received off the highway, the Court cannot say, as matter of law, that there was nothing for the jury to consider."

The statute made it the duty of both the State Highway Commission and the contractors, when the public highways of the State are being improved and constructed, to select, lay out, maintain and keep in as good repair as possible *suitable detours* by the most practical route. The further duty of both to place or cause to be placed *explicit directions to the traveling public.*

It is well settled in this jurisdiction that all contracts subsequently made and entered into are interpreted in reference to the existing law pertinent to the subject. The laws in force become a part of the contract as if they were expressly incorporated. *House v. Parker,* 181 N. C., p. 40; *Johnson v. Yates,* 183 N. C., p. 24; *Douglas v. Rhodes,* 188 N. C., 585; *Ryan v. Reynolds,* 190 N. C., p. 563; *Humphrey v. Stephens,* 191 N. C., p. 101; *Electric Co. v. Deposit Co., ibid.,* p. 653.

This mandatory statute makes no distinction between local or through traffic. The life, limb and property of one who travels through the State is equally protected as one who lives in the particular locality. In compliance with this positive legislation, the State Highway Commission required defendants, in its contract for improving the road, as it should do, to provide, erect, maintain and illuminate (and finally remove same) barricades, danger and detour signs, *necessary to properly protect and direct* traffic. Defendants by contract assumed this vital and important duty to the traveling public. At the mouth, or forks of the road, and nowhere in the public highway that was to be improved, the distance of some three miles, were there any barricades put up to warn or stop travelers on this public highway. For them the door was wide open and they were invited to come in, and they went in. The only barricade was the road machine and concreting. When this was reached by plaintiff, a way over the railroad track was pointed out for plaintiff to detour by a man, where the work was going on, in a khaki colored car, the kind used by the State Highway Commission or an employee of defendants.

This road, contended by plaintiff as a *detour road,* was in plain view of all the agents and employees connected with the work being done by the defendants, contractors. According to the evidence of plaintiff, it was being used constantly by the public with automobiles, trucks, etc. It crossed the railroad, a place made for the purpose, but no timbers or planks were placed to keep the wheels of automobiles or vehicles from falling down between the cross-ties. On plaintiff's return the evening after he crossed the railroad track in the morning, the constant travel over the railroad crossing had cut the sand deeper during the day. When he started over the crossing the automobile rolled over into and between the ends of the crossties. The bottom of the engine fell on the T-iron and broke the engine all to pieces. The driver was careful and came up easy on the track.

Under the general State law, as well as the express contract entered into by defendants with the State Highway Commission, it was the defendants' duty to use due or ordinary care to keep the railroad crossing, under all the facts and circumstances of this case, in a reasonably safe condition. It was the duty of plaintiff, before crossing the track, to use due or ordinary care. The court below, in a careful charge, explained fully the law, unexcepted to, applicable to the facts. In regard to "The State Highway Commission shall maintain all detours for strictly through traffic," set forth in the contract, this does not affect this case. Under a mandatory statute and their contract, defendants owed a duty to the public which it cannot shirk and cast on another. We can find

No error.

J. A. HUTCHINS v. BOARD OF COMMISSIONERS OF GRANVILLE COUNTY.

(Filed 27 April, 1927.)

Rewards—Criminal Law—Officers—Sheriffs.

It is within the power of the Legislature to enact a valid statute giving a reward to those who arrest or cause to be arrested vilators of the criminal law, including officers who are paid for making the arrest in pursuit of their duties.

APPEAL by defendant from *Midyette, J.*, at February Term, 1927, of GRANVILLE. Affirmed.

Action to recover fees or rewards provided by statute, for arrest of persons convicted of violations of the prohibition law. From judgment upon facts agreed, defendant appealed to the Supreme Court.

Royster & Royster for plaintiff.

A. A. Hicks, W. M. Hicks and Brummitt & Taylor for defendants.

PER CURIAM. Chapter 318, Public-Local Laws 1925, is entitled "An act regulating the payment of fees for the seizure of distilleries and the apprehension and conviction of violators of the prohibition laws in Granville County." This act was ratified on 6 March, 1925, and became effective from and after said date. Section 2 of said act is as follows:

"For every person apprehended, arrested and found guilty of violating the prohibition law in Granville County, the board of commissioners shall pay the sum of twenty-five dollars to the sheriff or other police officer apprehending and arresting such violator of the prohibition laws so convicted."

Plaintiff is now and was during the months of June and July, 1926, chief of police of the town of Oxford, in Granville County. During said months he apprehended and arrested ten persons, each of whom was charged with a violation of the prohibition laws of North Carolina. Each of these persons was thereafter convicted in a court of competent jurisdiction of a violation of said laws. Plaintiff has presented to defendant board of commissioners his claim against said board for $250. Said claim is made up of ten items, each for $25, the fee or reward provided by statute for the arrest and apprehension of each of said persons. Defendant has declined to allow and pay said claim, contending that chapter 318, Public-Local Laws 1925, is contrary to public policy and for that reason unconstitutional.

Upon the facts agreed, the court was of opinion that plaintiff is entitled to recover of defendant the sum of two hundred and fifty dollars with interest, and rendered judgment accordingly.

The validity of a statute enacted by the General Assembly, in the exercise of the police power, providing for the payment out of public funds of a reward for the apprehension and arrest of a person charged with a violation of the criminal law of the State, cannot be successfully challenged. See C. S., 4554. Whether or not a sheriff or other police officer whose official duty it is to arrest such person and who receives compensation, by fees or otherwise for the performance of this official duty, shall also be entitled to a reward provided for by statute is a matter of policy to be determined by the General Assembly. See C. S., 4555. We are unable to perceive any ground upon which the validity of chapter 318, Public-Local Laws 1925, can be successfully attacked.

The distinction between this statute and the statute involved in *Tumey v. Ohio,* decided by the Supreme Court of the United States, 7 March, 1927, 71 L. Ed., 508, is, we think, quite apparent. No fee or reward is allowed by this statute to an officer exercising judicial power. The reward is paid solely for the apprehension and arrest of a violator of the law. The officer to whom the reward is payable is not required to procure the conviction of the person arrested by him. He is not even required to produce evidence upon which the accused person shall be convicted. The reward is payable for the performance of a purely ministerial act only. We find no error. The judgment is

Affirmed.

J. A. FISHELL AND HIS WIFE, LEAH H. FISHELL, v. MAGGIE E. EVANS AND ELLA V. EVANS, ADMINISTRATRICES OF THE ESTATE OF F. O. FISHELL.

(Filed 4 May, 1927.)

1. **Actions—Bills and Notes—Parties—Joint Payees—Demurrer.**

   It is necessary for all of the joint payees of a note to unite as parties plaintiff thereon, and where it properly appears to the court that they have not done so, the maker's demurrer to the action for want of proper parties is good.

2. **Same—Limitation of Actions—Statutes—Parties—Amendments—Husband and Wife.**

   Where a note is made to the husband and his wife as joint payees, and the action thereon is brought by the husband alone, an amendment joining the wife as a party to the action (C. S., 547), after the running of the statute of limitations is in effect the bringing of a new action, which also will be barred. C. S., 446, 511.

APPEAL by defendant from *Oglesby, J.,* at November Term, 1926, of FORSYTH. Reversed.

Action upon note begun in Forsyth County Court. From judgment rendered therein upon verdict of the jury, defendants appealed to the Superior Court of said county.

Upon said appeal, defendants' assignments of error, based upon exceptions taken during the trial in the county court, were not sustained. From judgment affirming the judgment of the county court, defendants appealed to the Supreme Court.

I. E. Carlyle and Manly, Hendren & Womble for plaintiffs.
Forrest G. Miles and A. E. Holton for defendants.

CONNOR, J. On 8 June, 1892, F. O. Fishell executed his promissory note in words and figures as follows:

"One day after date I promise to pay to the order of J. A. Fishell and wife the sum of two hundred dollars ($200), for value received, in the purchase of the Kimble place. This note, together with all interest at the rate of 8 per cent, to be paid at or before my death, if not paid before.

"This 8 June, 1892. Interest paid semiannually.
"F. O. FISHELL."

F. O. Fishell died on 25 October, 1920; defendants duly qualified as his administratrices on 1 November, 1920.

Summons in an action entitled "J. A. Fishell v. Maggie E. Evans et al., Administratrices of F. O. Fishell" was issued on 23 January, 1923; a duly verified complaint was filed in said action, in which plaintiff J. A. Fishell demanded judgment upon the note above described. Duly verified answer was filed by defendants on 23 February, 1923, in which they denied the execution of said note by F. O. Fishell.

Thereafter, on 5 January, 1924, Leah H. Fishell, wife of J. A. Fishell, was, upon her own motion, made a party plaintiff in said action, the summons being amended by including her name therein. An amended complaint was thereupon filed on 22 April, 1925, in which plaintiffs J. A. Fishell and his wife, Leah H. Fishell, allege that they are joint owners of said note, and demand judgment that they recover jointly of defendants the amount due thereon. Defendants in their answer to the amended complaint, among other defenses, plead the three-year statute of limitations in bar of plaintiff's recovery on said note.

The second and third issues submitted to the jury upon the trial in Forsyth County Court are as follows:

"2. Is the cause of action of the plaintiff J. A. Fishell barred by the statute of limitations? Answer:

"3. Is the cause of action of the plaintiff Leah H. Fishell barred by the statute of limitations? Answer:"

In apt time defendants requested the court to charge the jury as follows: "If you believe the testimony, you will answer the second and third issues 'Yes.'" The court refused to so charge, and defendants excepted.

The court thereupon charged the jury as follows: "The court charges you, upon the record, that your answer to the second and third issues will be 'No.'" Defendants excepted to this charge.

Defendants' assignments of error, based upon the foregoing exceptions, were not sustained upon their appeal to the Superior Court. In this defendants, upon their appeal to this Court, contend there was error.

Plaintiffs J. A. Fishell and Leah H. Fishell, his wife, are joint payees, and, as they allege in their complaint, joint owners of the note sued upon. Neither of them can, therefore, recover on said note in an action in which he or she alone is plaintiff. "Where a bill or note is made payable to several persons, or is endorsed or assigned to several, they are joint holders and must sue jointly as such." 8 C. J., 846. In *Sneed v. Mitchell,* 2 N. C., 292, it is said: "The reason why a contract made with several persons jointly must be sued by all is because if they were to sue severally they could recover only their several proportions; no one could recover all to the exclusion of the others; and if each could recover only his proportion, then the defendant upon one contract would be subject to as many suits as there were persons with whom he made it. If one might sue alone, by the same reason, each of them might sue alone. All this mischief is avoided by one joint action brought by all." See *Phœnix Assur. Co. v. Fristoe,* 53 W. Va., 361, 44 S. E., 253; also, *Dotson v. Skaggs* (W. Va.), 87 S. E., 460; L. R. A., 1916 D, 761.

The complaint filed by J. A. Fishell, in which he alone demanded judgment upon the note set out in the complaint, was subject to demurrer, for it appeared upon the face thereof that he was not the real party in interest. C. S., 446; C. S., 511. The real parties in interest, to wit: J. A. Fishell and his wife, Leah H. Fishell, did not become plaintiffs in the action to recover upon said note until 5 January, 1924, on which date Leah H. Fishell, by amendment to the summons, was made a party plaintiff with her husband, J. A. Fishell. Prior to said date, no action had been commenced by the real parties in interest on the note which stopped the running of the statute of limitations on the right of action which accrued at the maturity of the note. The court had power to amend the summons by allowing the motion of Leah H. Fishell that she be made a party plaintiff. C. S., 547. But as the result of this amendment was to constitute a new action against defendants, it did not deprive them of the right to plead the statute of limitations in bar of recovery in such action. *Reynolds v. R. R.,* 136 N. C., 345; *Goodwin v. Fertilizer Works,* 123 N. C., 162; *Sams v. Price,* 121 N. C., 392. For the purpose of the defense based upon such plea, this action was commenced on 5 January, 1924. As more than three years had then elapsed since the death of the maker of the note, on 25 October, 1920, the action is barred as against both plaintiffs, whether the action upon the note accrued at the death of the maker, as contended by plaintiffs, or one day after the date of the note, to wit, 9 June, 1892, as contended by defendants. It is therefore immaterial, for the purpose of passing upon the above assignments of error, to decide when the note became due. In any event, upon the facts appearing upon the record, the action is barred as to both plaintiffs. There was error in the refusal of the judge of the Superior Court to sustain defendants' assignments of error based upon the exceptions as stated. These assignments of error should have been sustained and a new trial ordered.

In view of our decision, we do not deem it necessary to discuss or to decide other assignments of error relied upon by defendants upon their appeal to this Court. It is manifest that upon the uncontroverted facts plaintiffs' action is barred, and that they are not entitled to recover in this action. The judgment is

Reversed.

COMMERCIAL INVESTMENT TRUST v. ALBEMARLE MOTOR COMPANY, STANLY BANK AND TRUST COMPANY, AND A. P. HARRIS, TRUSTEE.

(Filed 4 May, 1927.)

1. Sales—Conditional Sales—Chattel Mortgages—Registration—Liens—Mortgages.

Where the vendor retains title upon a chattel sold and delivered for the payment of the balance of the purchase price to be divested, and the property to become that of the purchaser upon his payment thereof at a time specified, it is a sale upon condition in the nature of a chattel mortgage requiring registration in respect to its priority of lien over chattel mortgages subsequently given to others upon the same property and registered in the proper county. C. S., 3312.

2. Same—Bills and Notes—Drafts—Order, Notify.

Where a seller of automobiles under a contract retaining title until the balance of the purchase price shall have been paid, ships the goods to its own order, notify the consignee and attaches it to a draft on the purchaser for the initial payment, a bank lending the required amount to make this payment secured by a chattel mortgage duly registered on the machines with which the draft was paid and delivery made by the carrier to the consignee, upon presentation of the bill of lading, has priority of lien over that of the seller under his unregistered contract of sale.

APPEAL by plaintiff from *Stack, J.,* at February Term, 1927, of STANLY. No error.

The plaintiff brought suit to recover two Jewett motor cars, alleged to have been held in trust for the plaintiff by the Albemarle Motor Company, and caused said cars to be seized under proceedings in claim and delivery. The defendants denied the plaintiff's allegations, and pleaded a counterclaim, to which the plaintiff replied. At the trial one issue was submitted to the jury and answered: "What was the value of the two automobiles at the time they were seized by claim and delivery proceedings and sold by the plaintiffs? Answer: '$2,575.'"

After the verdict was returned the parties agreed that the judge might find the remaining facts and render judgment.

The cars were consigned to the shipper with direction to notify the Albemarle Motor Company. At the same time a draft was drawn on this company, with bill of lading attached, for 20 per cent of the net invoice price and acceptances to be signed by the defendant company for the remaining 80 per cent. The Albemarle Motor Company borrowed the 20 per cent from the Stanly Bank and Trust Company and executed its chattel mortgage on the cars to the defendant Harris, as trustee, to secure the debt. This mortgage was duly registered and the 20 per cent was paid and the acceptances were turned over to the plaintiff. Twenty per cent of the invoice price and the charge for freight amounted to $714.42. The material part of the judgment is as follows: "The twenty per cent and freight having been advanced by the Stanly Bank and Trust Company for Cotton and Smith upon a chattel mortgage by said Cotton and Smith for the amount which was duly recorded, and the paper-writing in evidence by the plaintiff the court holds to be nothing more than a retention of title contract that should have been recorded as against the defendant bank, but which was not recorded until after the mortgage given by Cotton and Smith to the said bank had been registered, the court is of the opinion, upon these facts and the evidence in the case, that the plaintiffs, as against Cotton and Smith, are the owners of the two automobiles seized, but subject to the rights of the defendant bank for the twenty per cent of the purchase price and freight furnished by them to Cotton and Smith, and, therefore, upon motion, the defendant bank will recover of the plaintiffs and the sureties on their undertaking the penal sum of $3,359.36, to be discharged upon payment to the defendant bank the sum of $714.42, with interest thereon from 1 October, 1923, until paid, and the cost of this action, to be taxed by the clerk."

The plaintiffs excepted and appealed.

Bogle, Bogle & Morton for appellants.
W. L. Mann and R. L. Smith & Son for appellees.

ADAMS, J. The registration of the chattel mortgage antedates that of the contract between the plaintiff and the Albemarle Motor Company; if, therefore, the contract is a conditional sale of the cars, the chattel mortgage has priority, and the debt due the bank should be paid. C. S., 3312; *Observer Co. v. Little,* 175 N. C., 42. What, then, is the legal effect of the contract?

If personal property is delivered by one person to another under the terms of a contract whereby the latter is to acquire the retained title to the property upon the performance of a condition, such as the payment of the purchase price at a certain time, or in a designated manner, or by giving his note for the price, the transaction is a conditional sale. *Whitlock v. Lumber Co.,* 145 N. C., 120; *Wilcox v. Cherry,* 123 N. C., 79; *Barrington v. Skinner,* 117 N. C., 47; *Frick v. Hilliard,* 95 N. C., 117; *Vasser v. Buxton,* 86 N. C., 335; *Clayton v. Hester,* 80 N. C., 275; *Parris v. Roberts,* 34 N. C., 268; *Ellison v. Jones,* 26 N. C., 48. If treated as a bailment, a conditional sale is a bailment with the right in the bailee to become the owner of the property upon performance of the condition. The contract, when subjected to the test of these decisions, is a sale with title retained—a conditional sale; it refers to the cars as "purchased" by the motor company; to the payment of 20 per cent of the price; to acceptances given by the company, and to the intention of the parties to preserve the seller's title until the acceptances and any other indebtedness due by the company were fully paid. This is much more than a bare contract of agency. There is

No error.

T. D. PARISH ET AL. v. K. P. HILL ET AL.

(Filed 4 May, 1927.)

1. **Deeds and Conveyances—Title—Betterments.**

Where one is in lawful possession of lands under an apparent right to demand title from the owner, and places improvements thereon, upon eviction, if he claim betterments, he must account for rents.

2. **Actions—Issues—Parties—Appeal and Error.**

Where the defendant has been in possession of plaintiff's lands claiming under a grantor who had no title, and who was not a party to the action, issues as to contracts, or agreements made between the plaintiff and the grantor of defendant respecting the title that had not been conveyed, are erroneously submitted to the jury.

APPEAL by plaintiffs from *Bond, J.,* at November Term, 1926, of WAKE.

Civil action for rent, tried upon the following issues:

"1. Is the defendant K. P. Hill in possession of the land described in the complaint under a contract for sale from the Wombles, as alleged in the answer? Answer: 'Yes.'

"2. If so, was said contract broken and breached by the Wombles, the owners of the land, through no fault of the defendant K. P. Hill? Answer: 'Yes.'

"3. What is a reasonable rent for said land during the year 1926? Answer: '$125.'

"4. What amount, if any, is the defendant K. P. Hill entitled to recover as damages on account of said breach of contract for sale of said lands? Answer: 'None.'

"5. Is the defendant K. P. Hill in possession of said land under a rental contract, as alleged in the complaint? Answer: 'No.'

"6. If so, what amount, if any, is the plaintiff T. D. Parish entitled to recover of the defendant K. P. Hill for the rent of said lands during the year 1926? Answer: 'None.'

"7. What amount, if any, is the defendant K. P. Hill entitled to recover on his counterclaims, as set forth in the answer, as against T. D. Parish? Answer: 'None.'"

From a judgment on the verdict permitting the defendants to remain on the land during the balance of the year 1926, without paying any rent therefor, and to remove the crops, the plaintiffs appeal, assigning errors.

Bart M. Gatling for plaintiffs.
Thomas W. Ruffin for defendants.

STACY, C. J. The determinative facts bearing on the questions presented are as follows:

1. During the latter part of February, 1926, J. J. Womble and wife, Meta Ellen Womble, who were at that time the owners of the land described in the complaint, the rent for which is now in dispute, agreed to exchange said land for certain lands near Cary, owned by K. P. Hill.

2. Womble and wife duly executed a deed for their land and placed the same in escrow to be delivered only upon condition that Hill should convey, by good and sufficient deed, his lands in Cary to Meta Ellen Womble.

3. The Wombles thereupon put Hill in possession of their land, the land described in the complaint, and Hill put the Wombles in possession of his Cary lands.

4. Hill never executed deed for his Cary lands, because, as he says, in August, 1926, a judgment for $450 was docketed against Womble and wife, which became a lien upon the land described in the complaint.

5. On 4 October, 1926, the land described in the complaint was sold by the Wombles to the plaintiffs T. D. Parish and wife for a valuable consideration, and with the understanding that said grantees would be entitled to collect rent for the year 1926.

It was admitted on the trial that the plaintiffs are the owners of said land under this deed, but Hill and his tenants, defendants herein, contend that they are entitled to remove their crops, without paying any rent for the year 1926, and to be compensated for improvements or betterments placed thereon.

It is the position of the plaintiffs that they are entitled, as a matter of right, to recover of the defendants a fair sum as rent for said land during the year 1926, less a reasonable amount for any permanent improvements or betterments placed thereon by the defendant K. P. Hill while he was in possession of same.

Issues were tendered, based on this view of the case, which the court declined to submit, and exception was duly entered to the issues submitted to the jury.

We think the view advanced by the plaintiffs is the correct one, and that the case has been tried on an erroneous theory. *Pass v. Brooks,* 125 N. C., 129; *S. c.,* on rehearing, 127 N. C., 119; *Stinson v. Sneed,* 163 S. W. (Tex.), 989; *Goodloe v. Woods,* 80 S. E. (Va.), 109. "As the defendant claims betterments, he must account for rent"—*Furches, C. J.,* in *Bond v. Wilson,* 129 N. C., 325.

The fourth issue would seem to have no place in the present action, the Wombles not being parties, and this, no doubt, was confusing to the jury. Furthermore, we find no evidence on the record sufficient to support the answer to the second issue. Hill admits in his own testimony that from February to 26 August he neglected, without cause, to execute deed to his Cary lands, which he had agreed to do.

It seems apparent that the jury simply compromised the case, or arbitrated it, without consent of the parties that it might be settled in this way.

Let the cause be remanded, to the end that further proceedings may be had as the law directs, and the rights of the parties require.

New trial.

STATE v. LESTER MULL.

(Filed 4 May, 1927.)

Intoxicating Liquor—Possession at Home of Accused—Statutes.

The mere possession of spirituous liquor in the home for the use of the owner, his family and their guests on the premises in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. C. S., 3411 *et al.*

APPEAL by defendant from *Finley, J.*, at January Criminal Term, 1927, of GASTON.

Criminal prosecution, tried upon an indictment charging the defendant, in eight separate counts, with violations of the prohibition laws, on 16 January, 1927, as follows:

1. Manufacturing intoxicating liquors. C. S., 3367 and 3411 (b).
2. Receiving spirituous or vinous liquors or intoxicating bitters during the space of fifteen consecutive days, in a quantity or quantities totaling more than one quart. C. S., 3386.
3. Transporting intoxicating liquors. C. S., 3411 (b).
4. Having and keeping in possession spirituous or vinous liquors for the purpose of sale. C. S., 3379 and 3411 (b).
5. Selling intoxicating liquors for gain. C. S., 3378 and 3411 (b).
6. Delivering, furnishing, purchasing, or possessing intoxicating liquors. C. S., 3411 (b).
7. Possessing for sale utensils, paraphernalia, etc., intended for use in the unlawful manufacture of intoxicating liquors. C. S., 3411 (d).
8. Receiving spirituous or intoxicating liquors.

The evidence on behalf of the State—there was none offered by the defendant—tends to show that on Sunday, 16 January, 1927, four officers went to the home of the defendant in Gaston County with a proper search warrant to search his dwelling-house and premises for intoxicating liquor. They found a pint bottle in the kitchen, or cook room, on a shelf, about two-thirds full of liquor. A woman living in the house with the defendant said the bottle belonged to her. It does not appear in the evidence who this woman was, or in what capacity she was there. The defendant was present when the search was made. The officers left without making any arrest, but returned about nine-thirty or ten o'clock that night and took the defendant into custody.

During the summer previous to this, the officers had found thirty-five pints of liquor in the woods about 250 yards from the filling station operated by the defendant, which is some distance from his house, but they did not charge him with having it, as they could not connect him with it, or prove that it was his.

Verdict: "Guilty of receiving and possessing."

Judgment: Imprisonment in the common jail of Gaston County for a period of two years, and assigned to work upon the public roads of said county.

Defendant appeals, assigning errors.

Attorney-General Brummit and Assistant Attorney-General Nash for the State.

A. A. Tarlton for defendant.

STACY, C. J., after stating the case: The fact situation, out of which the law of this case arises, especially when viewed in the light of the verdict, is different from any heretofore presented for our consideration.

The eighth count in the bill of indictment is bad, and may be disregarded. It was said in *S. v. Hammond,* 188 N. C., 602, that the mere receipt of liquor, in one's home, for a lawful purpose, is not forbidden by any proper construction of the statute. The word "receive" is nowhere used in the statute; hence, the verdict on the eighth count is apparently without warrant of law.

The mere possession of intoxicating liquor at any place, whether in one's private dwelling or elsewhere, is made by the statute "*prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of, in violation of the provisions of this act." C. S., 3411 (j); *S. v. Hammond, supra; S. v. Meyers,* 190 N. C., 239. The statute further provides: "But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his bona fide guests when entertained by him therein."

Here the jury has acquitted the defendant on the fourth count, in which he was charged with having in his possession spirituous liquors for the purpose of sale, and he is not charged with having it in his possession for the purpose of giving it away, or otherwise disposing of it, in violation of the provisions of the Turlington Act. Chapter 1, Public Laws 1923.

We are, therefore, face to face with the question as to whether the mere possession in one's home of two-thirds of a pint of liquor is unlawful when there is neither finding nor allegation that such possession is for a purpose condemned by the statute.

We agree with the learned Assistant Attorney-General, Mr. Nash, that on the record as presented, the conviction in the instant case cannot be sustained. The jury has found that the liquor in question was not kept by the defendant for the purpose of sale, and there is no charge in the bill of indictment that it was kept for the purpose of being "given away, or otherwise disposed of." Hence, if it be lawful to possess liquor in one's private dwelling, occupied only as such, for the personal consumption of the owner, his family and *bona fide* guests when entertained therein, we apprehend the failure so to use the liquor, thus kept in one's home, would not make its possession therein unlawful, unless, in addition, such liquor were kept there for some purpose condemned by the statute, with which the present defendant has either been acquitted or not indicted.

Furthermore, if the statement of the woman in the house, who does not appear to have been the defendant's wife, agent or servant, is to be believed, it would appear that the bottle was not in the actual or constructive possession of the defendant. There was no evidence of any possession outside of the defendant's private dwelling, as was the case in *S. v. Baldwin, ante,* 566, *S. v. Sigmon,* 190 N. C., 684, *S. v. Meyers, ibid.,* 239, *S. v. McAllister,* 187 N. C., 400, and the jury has not found that the defendant had the liquor in his home for any purpose condemned by the statute.

We are, therefore, of opinion that, on the record, the defendant is entitled to be discharged.

Reversed.

SHELTON v. SOUTHERN RAILWAY COMPANY.

(Filed 4 May, 1927.)

1. **Negligence—Evidence—Subsequent Changes Made at Place—Appeal and Error.**

   Where the condition of a railroad track in an action against the company to recover damages for an alleged negligent injury is a material element of the negligence relied on by the plaintiff, evidence is incompetent upon that issue alone, which tends to show that soon after the occurrence complained of the defendant caused the place to be fixed so as to avoid like consequences in the future.

2. **Same—Independent Changes.**

   Where the evidence of subsequent repair of conditions as showing negligence of defendant is relied on, if competent it must be shown by the plaintiff to have been made by the defendant and not by an independent agency for its own purposes.

3. **Evidence — Appeal and Error — Objections and Exceptions — Cross-Examination—Waiver.**

   Where testimony of a witness has been erroneously admitted by the court to be introduced at the trial after the appellant had duly and properly excepted thereto, upon cross-examination he may question the same witness upon the subject-matter of his exception without waiving any of his rights on appeal.

CIVIL ACTION, tried in the county court of ROCKINGHAM, at September Term, 1926.

The evidence of plaintiff tended to show that on the night of 10 October, 1925, plaintiff left Reidsville in a Ford touring car, going in the direction of Greensboro, and arrived at the Haw River crossing between seven and eight o'clock; that he saw a train upon the track of the defendant about sixty or one hundred yards, going north, and stopped his car and waited until this train had passed the crossing. After the train had passed the lights on the crossing went out, and the plaintiff started across the track of the defendant.

The plaintiff testified: "Before going on the crossing after the northbound train had passed, I looked toward Greensboro and towards Reidsville for an approaching train and did not see any, looked at the lights, where the lights are supposed to be, and it was dark, and I started across. . . . The train did not blow its whistle nor ring any bell before approaching this crossing. When I came to myself I had a severe headache, I was aching all over, my neck was swollen up."

Witness for plaintiff crossed the track at this public crossing just ahead of the plaintiff, and testified that when the fore wheels of his car were on the track the headlights of the southbound train shone in the side of his car; that thereupon the engineer of defendant's train blew three quick blasts, and witness hurried across; that almost immediately following the danger signal from the engine witness heard the crash of the impact of the train and plaintiff's car. There was evidence that the train was running about sixty miles an hour, and that no whistle was blown and no bell rung, and no warning of any kind given of the approach of said train prior to the danger signal immediately before the impact.

Issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. The defendant appealed to the judge of the Superior Court upon the exceptions and assignments of error duly taken at the trial. The appeal was heard at the February Term, 1927, by *Harding, J.*, who overruled all of defendant's exceptions and affirmed the judgment of the county court. Whereupon the defendant appealed.

Glidewell, Dunn & Gwyn for plaintiff.
Ivie, Trotter & Johnston for defendant.

BROGDEN, J. Plaintiff alleged "that in addition to the failure of defendant to blow his whistle and to ring his bell and otherwise give the plaintiff the proper necessary warning, the defendant maintained an embankment upon its right of way, as hereinbefore described, which extended within a short distance of said crossing, which said embankment obstructed the view of plaintiff and prevented him from seeing said train until same had approached him within a short distance of said crossing, and until plaintiff had proceeded to cross said track; that the defendant failed to provide a proper electric signal or gong at said crossing, in that the red signal light was not shining or burning, and thereby the plaintiff was not warned of the approach of said train."

The defendant denied the foregoing allegations.

A witness for plaintiff was asked: "(Q.) I will ask you to state whether or not the embankment which was there at the time of this wreck is there at the present time. (A.) No, sir. (Q.) Please state what has happened to it since the time of the wreck. (A.) It has been moved away. (Q.) How long after the wreck was it before it was moved? (A.) I don't recall exactly, but I do recall talking with the people who were doing the work. (Q.) Over how much distance, or about how much of that bank was cut down or moved? (A.) I don't know exactly, but it was something like 150 feet of it; something in the neighborhood of that."

To all of these questions, except the first, the defendant objected. The trial judge admitted the evidence, and the defendant excepted.

Another witness for plaintiff was permitted to answer the following questions over the objection of defendant:

("Q.) Describe the condition of that embankment, or where the embankment was, and describe what you saw. (A.) I didn't see it moved. (Q.) State what you did see. (A.) From appearances, it is new soil there, and the places along the edge of the cut where the cut goes down in the railroad there is a little embankment down to the bottom of the cut, and I saw a plow point and another piece of machinery there, and it had practically no vegetation on it; you can see it is new soil. (Q.) Over what distance did that condition extend in feet, parallel with the railroad? (A.) 172 feet."

This evidence was not admitted in connection with a description of conditions existing at the time of the injury, or for the purpose of identifying the crossing where the injury occurred. It would seem apparent that the sole object of the testimony was to show changes made by the defendant near the crossing after the injury had occurred. The legal question raised, therefore, is, under what circumstances may evidence be offered to show changes, subsequent to the injury, made upon or near the premises where the injury occurred, or in the instrumentality causing the injury?

In *Lowe v. Elliott,* 109 N. C., 581, the Court said: "While we do not say that there may not be peculiar cases in which such testimony may be relevant, we are entirely satisfied with the above reasoning as applicable to the facts of the present case. The testimony was improper, and probably had a very important influence with the jury in making up their verdict."

In *Aiken v. Mfg. Co.,* 146 N. C., 324, *Connor, J.,* delivering the opinion, said: "We are constrained, however, in view of the decisions of this Court, and the almost uniform opinion of text writers based upon the decisions of other courts, to order a new trial, by reason of the error committed in admitting the evidence of the change made in the platform after the injury was sustained by plaintiff."

In *McMillan v. R. R.,* 172 N. C., 854, it is held: "The subsequent changes in signals or warnings for additional safety were properly excluded under the circumstances as proof of negligence. Precautions against the future cannot be considered as an admission of actionable negligence in the past." The opinion of the Court approved the statement of *Baron Bramwell* as follows: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." The Court, in its opinion, quotes *R. R. v. Hawthorne,* 144 U. S., 202 (36 L. Ed., 405), as follows: "Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

The general rule, established by the overwhelming weight of authority, is that evidence of such subsequent changes is not admissible to show negligence, nor as an admission of negligence. There are, however, certain clearly established exceptions to the general rule within which such evidence is competent. These exceptions may be classified as follows:

(1) Where such evidence tends to show ownership or control of the place where the injury occurs, where such ownership or control is controverted; (2) when the question in controversy is as to whose duty it was to make repairs; (3) to contradict a witness; (4) to show that the injury was brought about in the manner alleged; (5) to show existing conditions under certain circumstances at the time of the injury. *Myers*

v. Lumber Co., 129 N. C., 252; *Blevins v. Cotton Mills,* 150 N. C., 493; *Tise v. Thomasville,* 151 N. C., 281; *Pearson v. Clay Co.,* 162 N. C., 224; *Boggs v. Mining Co.*, 162 N. C., 393; *McMillan v. R. R.*, 172 N. C., 853; *Muse v. Motor Co.*, 175 N. C., 466; *Farrall v. Garage Co.,* 179 N. C., 389; *Ledford v. Lumber Co.*, 183 N. C., 614.

The testimony admitted by the trial court in this case does not fall within any of the exceptions. While the defendant entered general denial to all of the allegations in paragraph twelve of the complaint, there was no evidence offered by it denying the existence of the embankment some distance from the crossing at the time of the injury. So that the existing conditions, with respect to the embankment, prevailing at the time plaintiff was struck by the train were not in controversy, and this is the only possible exception to the general rule under which the testimony objected to could be classified. Moreover, there was no evidence that the embankment near the crossing was cut down by the defendant, or by its direction and approval. Indeed, the undisputed testimony was to the effect that any dirt that had been removed therefrom was moved by the Highway Commission.

The plaintiff, however, contends that, even if the evidence was incompetent, in the first instance, the defendant lost the benefit of its exception by virtue of the fact that on cross-examination of one of plaintiff's witnesses the following testimony was elicited: "There has been a whole lot of road work done in the last year, and they used metal machinery. Of my own knowledge, I do not know that there has ever been any work done there, cutting down a bank, or how much was cut down." And further, that witness for the defendant testified: "The railroad has never moved any dirt off this fill since 10 October, 1924. . . . The State Highway people are the only people I know anything about getting any dirt." . . .

It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost. *Smith v. R. R.*, 163 N. C., 143; *Tillett v. R. R.*, 166 N. C., 515; *Beaver v. Fetter,* 176 N. C., 334; *Marshall v. Tel. Co.*, 181 N. C., 410.

The principle of law relied upon by the plaintiff is thus stated in the headnote of *Hamilton v. Lumber Co.*, 160 N. C., 47: "The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that on cross-examination the witness was asked substantially the same question and gave substantially the same answer."

This rule is sound and wholesome, and tends to confine the inquiry to the points in issue, and obviate prolix and needless questioning of a witness, and endless repetition of testimony; but when a trial judge admits evidence over objection, it thereupon becomes proper evidence to be considered by the jury so far as the particular trial in the Superior Court is concerned, and the rule does not mean that the adverse party may not, on cross-examination, explain the evidence or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception.

"The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief is an absolute right, and not a mere privilege. Cross-examination 'beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated.'" *Varser, J.*, in *Milling Co. v. Highway Commission,* 190 N. C., 692, citing authorities. That this interpretation of the rule is in accord with the greater weight of authority will appear from an examination of decisions upon the subject in other jurisdictions.

In *Bank v. Middleton,* 201 Pac., 683 (Montana), it appeared that defendant's witness, on direct examination, related a conversation with a person who was not a witness in the case or party to the suit. Plaintiff objected to the conversation on the ground that it was hearsay. The objection was overruled, and an exception duly noted. On cross-examination the conversation was repeated. Plaintiff assigned error in the ruling of the court admitting the testimony. The defendant contended that since the plaintiff had cross-examined the witness and elicited a repetition of the testimony objected to, the error, if any, was thereby cured or waived. The Court says: "We have carefully analyzed the cases cited by defendants, and find that, while they state the rule of curing error by cross-examination, yet from the facts and circumstances of each case it is plainly evident that they are in no sense applicable to the point as it is involved here." In *Barker v. R. R.*, 126 Mo., 143, the Court said: "Nor can it matter, in the result, that the defendant's counsel, on cross-examination, asked the witness to repeat his account of the interview with the conductor. That course did not amount to a waiver of the right to urge the exception already saved to the ruling of the court in admitting the interview. Counsel might properly conform to that ruling for the purposes of the trial, without thereby waiving the right to review the admission of incompetent evidence that had come in, over his objection. After that evidence was before the jury, he might then combat it or meet it, as best he might, without waiving the exception already taken." In *Marsh v. Snyder,* 14 Neb., 237 (15 N. W., 341), the Court said: "Where an exception is duly taken to the admission of illegal testimony, it is not waived by mere cross-examination of the witness respecting it." In *Cathey v. R. R.,* 104 Tex., 39, 33 L. R. A. (N. S.), 103, the Texas Court said: "There are cases holding that objections to testimony are waived when the objecting party on cross-examination subsequently goes into the same matter, but this is clearly against the weight of authority. It would indeed be a strange doctrine, and a rule utterly destructive of the right and all the benefits of cross-examination to hold a litigant to have waived his objection to improper testimony because, by further inquiry, he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on his cross-examination repeat or restate some or all of his evidence given on his direct examination."

In *Bank v. Kelly,* 152 N. W., 125 (North Dakota), the defendant introduced testimony to the effect that the cashier of the plaintiff bank had agreed that the defendant would not be required to pay the note. Plaintiff objected and excepted to the admission of this testimony. The defendant insisted that the plaintiff was estopped to claim the benefit of his exception for the reason that he had cross-examined about the same matter. The Court said: "It is true that there are cases holding that objections to testimony are waived when the objecting party on cross-examination subsequently goes into the same matter, but we do not believe that these holdings are sound in principle, and they are clearly contrary to the weight of authority. . . . We are satisfied that the plaintiff did not waive the erroneous admission of evidence over its objection by cross-examining the witness on the same subject; but that it had the right to attempt to destroy its harmful effect by cross-examination, if possible."

In *Electric Co. v. Corbin,* 72 Atlantic (Md.), p. 610, the Court said: "When testimony has been admitted and an exception noted, counsel may deem it necessary to cross-examine the witness on the subject; and, if it is simply a cross-examination, he ought not to be deprived of his exception: *Provided,* the record shows he does not intend thereby to waive it, and that ought to be inferred when it is strictly cross-examination. There is perhaps some confusion in the cases on this subject, but the rule ought not to be carried to the extent of placing an attorney in the position that he must either waive his exception or permit the evidence in chief to stand without cross-examination."

The Indiana Court, in *Washington, etc., Co. v. McCormick,* 49 N. E., 1086, held: "After the court had held, over the appellant's objection, that the evidence was competent, and had permitted appellee, who had the burden, to introduce such evidence to maintain his case, appellant, in seeking to overcome the case made by appellee, could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving his right to question the court's action."

The California Court, in *Jameson v. Tully,* 173 Pac., 577, said: "The respondent does not, in fact, attempt to justify the admission in evidence of these written and oral statements of the wife, implicating the defendant in her transgression, except upon the utterly untenable ground that the defendant, having, after the admission in evidence of the plaintiff's testimony as to these matters over his objection, undertaken to cross-examine the plaintiff thereon, in so doing waived his objection to their admissibility and his right on appeal to complain of the court's error in their admission. The authorities cited by counsel for the respondent in support of this contention do not sustain it. The cases cited all refer to the later introduction by the objecting party of independent evidence to the same point and effect as that to which the evidence objected to related. By the presentation on his own part of such independent proofs the objecting party, of course, waives his objection and point upon appeal; not so, however, when the objecting party undertakes to exercise his right to cross-examine a witness as to statements to which he has erroneously been permitted to testify. Were it otherwise, one of the main functions of cross-examination would be most seriously impaired; for a party, after rightfully objecting to the admission of evidence, may, by his cross-examination, lay the foundation for an obviously proper motion to strike it out, or may compel its contradiction or withdrawal, or may utterly destroy its effect, and thus render unnecessary his remedy by appeal from the court's erroneous action."

The Virginia Court, in *Virginia Power Co. v. Davidson, Admr.,* 89 S. E., 229, in discussing the question, said: "In this state of the record, we have no hesitancy in holding that the subsequent cross-examination of other witnesses on this subject, without formally repeating the objection, and the introduction of rebuttal testimony by the defendant, did not waive the previous objection, and that the motion to exclude was a timely and proper method of further saving the point."

The South Carolina Court, in *Green v. Shaw,* 134 S. E., 226, decided, 19 July, 1926, in an able and discriminating opinion by *Justice Stabler,* holds: "The defendant in this case offered as witnesses two Columbia physicians to testify to his reputation as a physician. The appellant strenuously objected to this testimony, but the court overruled his objection and admitted the testimony. The appellant having done all in his power by proper and timely objection, to exclude the objectionable testimony, elicited on cross-examination of the same witness a repetition of the same testimony that had been given on direct examination. Without making the testimony elicited the testimony of the cross-examining party, cross-examination may serve a number of useful purposes in the trial of a case, such as, for instance, testing the credibility of the witness or combating the effect of the testimony upon the minds of the jury. And we are unable to see why a litigant who has duly objected to the admission of incompetent testimony should be required to choose between foregoing the opportunity to accomplish such legitimate purposes through cross-examination of the testifying witness and waiving his right of appeal based on the court's error in admitting the testimony."

"The appellant's cross-examination of the witness in the case at bar coming clearly within the limits of strict cross-examination as herein set forth, we hold that she did not waive thereby her right to have her objection to the admission of the incompetent testimony reviewed on appeal. This holding is not in conflict with any rule laid down by this Court heretofore, and is supported by the great weight of authority."

The same rule, contained in the foregoing authorities, has also been announced and adhered to by the courts of South Dakota, West Virginia, New York, and Oregon. *McIlbaine v. First National Bank,* 146 N. W., 574 (South Dakota); *Poteet v. Imboden,* 88 S. E., 1024; *Woods v. Buffalo R. R. Co.,* 9 N. E., 505 (New York); *Wallace v. American Life and Ins. Co.,* 225 Pac., 192 (Oregon). This case was decided 15 April, 1924, and contains an imposing list of authorities.

We are of the opinion that, upon the record as presented, the defendant did not waive his exception to the evidence erroneously admitted by the trial court, because the cross-examination was strictly confined to the point, and the rebuttal evidence as to the moving of the dirt was no more than a mere explanation of the testimony erroneously admitted. Therefore, under the authorities, for the error specified, a new trial must be awarded.

There are other grave exceptions in the record, but, as they may not occur at a subsequent trial, they will not be discussed.

New trial.

JAMES YOUNG CARTER, BY HIS NEXT FRIEND, MAUD YOUNG RAY, v. LULA E. YOUNG AND WAKE COUNTY SAVINGS BANK, EXECUTOR AND TRUSTEE OF THE ESTATE OF JAMES H. YOUNG.

(Filed 4 May, 1927.)

1. **Wills—Executors and Administrators—Powers—Trusts—Bad Faith of Trustee.**

Where it clearly appears to be the intent of the testator in the construction of his will that a certain income from his estate held in trust is to be equitably apportioned between his widow and his grandson, in accordance with the judgment of the former to whom the executor and trustee is to make payment, it is required of the widow that she exercise the power in accordance with the testator's intent, and her refusing to pay anything whatsoever to the grandson out of the funds she so receives, is bad faith and a breach of the trust imposed on her, which gives the court of equity jurisdiction and power to interfere and fairly make the apportionment between them.

2. Same—Pleadings—Demurrer.

Where the complaint sufficiently alleges the complete breach of a special trust of a devisee in failing to pay over to another legatee his just proportion of moneys paid over by the executor and trustee under a will providing the total income should be paid to the special trustee giving her the power to make the apportionment between herself and the testator's grandson: *Held,* a demurrer is bad when resting upon the ground that the courts had no authority to interfere with her in the exercise of the power thus given her under the terms of the will.

APPEAL by plaintiff from *Bond, J.,* at November Term, 1926, of WAKE. Reversed.

Action to compel defendant, Lula E. Young, to make a fair and equitable apportionment, between plaintiff and herself, of certain funds heretofore paid and hereafter to be paid to her by defendant, Wake County Savings Bank, trustee, for the use of herself and plaintiff, pursuant to the provisions of the last will and testament of James H. Young, deceased.

From judgment sustaining demurrers filed by defendants to the complaint herein, upon the ground that said complaint does not state facts sufficient to constitute a cause of action upon which plaintiff is entitled to relief, plaintiff appealed to the Supreme Court.

Biggs & Broughton for plaintiff.
Douglass & Douglass for defendants.

CONNOR, J. The facts alleged in the complaint, and admitted by the demurrers, are as follows:

1. James H. Young died in the city of Raleigh, N. C., on 11 April, 1921, having first made and published his last will and testament, which was thereafter duly probated and recorded in the office of the clerk of the Superior Court of Wake County.

2. By his said last will and testament the said James H. Young, after providing therein for certain legacies, all of which have been paid by his executor, gave, devised, and bequeathed all the rest and residue of his property and estate, of whatsoever nature and wheresoever the same might be, to the defendant, Wake County Savings Bank, to be held, used, and disposed of by it in trust for the benefit of his wife, Lula E. Young, of Raleigh, N. C., his daughter, Maud Young Ray, of Winston-Salem, N. C., and his grandson, James Young Carter, of Raleigh, N. C.

3. By his said last will and testament the said James H. Young empowered and directed the said trustee to hold and manage the said trust estate until the final distribution thereof, as directed in said will; until such final distribution, the said trustee is authorized and directed

to collect and receive all the income from said estate, and out of said income to pay all costs and expenses of administering said estate.

4. With respect to the net income from said estate, the said trustee is directed by said will as follows:

"Until my said wife shall cease by remarriage to be my widow, or if she shall not remarry, then until her death, to pay semiannually four-fifths (4/5) of the net income from said trust estate to my said wife for the use (in such proportions and in such manner as she herself may decide) of herself and of my said grandson, and to pay semiannually the remaining one-fifth (1/5) of the net income from said trust estate to my said daughter, for her own use."

If defendant, Lula E. Young, shall remarry, then the trustee is directed to pay to her out of the principal of the trust estate the sum of $10,000, absolutely and free from the trust, and thereupon the said Lula E. Young shall have no further right to or interest in the estate of her deceased husband. If the said Lula E. Young shall remarry, or if she shall die prior to the arrival of plaintiff at the age of twenty-one, the trustee is directed to pay to him two-thirds, and to the daughter of the testator one-third of the net income from the trust estate until its final distribution as directed in the will.

5. It is further directed in said will that upon the happening of any one of various contingencies therein provided for, the entire trust estate then in the hands of said trustee shall be distributed finally as follows: One-third to Maud Young Ray, the daughter, and two-thirds to James Young Carter, the grandson of the testator, if both be living upon the happening of such contingency; if either be dead, then the share of such estate which, but for the death of the one dying before the happening of such contingency, would have been payable to him or to her, shall be paid to the survivor. Upon such final distribution as provided for in said will, the trust shall terminate and cease.

6. The present value of the trust estate now in the hands of defendant, Wake County Savings Bank, as trustee under the will, exceeds the sum of $85,000; the net income is not less than $4,000 per annum.

7. Since the probate of the said last will and testament, defendant, Wake County Savings Bank, executor and trustee named therein, from the net income of said estate, pursuant to the direction of the testator as aforesaid, has paid to defendant, Lula E. Young, widow of James H. Young, the sum of $200 per month, and to Maud Young Ray, his daughter, the sum of $50 per month; out of the sums thus paid to her by said trustee, the defendant, Lula E. Young has apportioned and paid out for the use of plaintiff, James Young Carter, grandson of the testator, the following sums, to wit: during October, 1921, $50; during December, 1921, $50; during May, 1922, $50. These are the only sums applied

by defendant, Lula E. Young, for the use of the plaintiff; she has failed and refused to apportion to or pay out for the use of plaintiff any further sum whatever from the amounts paid to her by the trustee from the net income from the trust estate; she now states that she does not propose to pay to the said James Young Carter, or for his use and benefit, any other or further sum from the amounts hereafter paid to her by the trustee from said income, notwithstanding the provisions of the said will.

8. Plaintiff, James Young Carter, is now about eleven years of age; at the date of the execution of the will, to wit: 26 August, 1920, he resided with the testator, his grandfather, at Raleigh, N. C.; he now resides with his mother, Maud Young Ray, at Winston-Salem, N. C.; he is greatly in need of the provision made for him by his grandfather in his last will and testament, and although demands have been made in his behalf upon defendant, Lula E. Young, that she make a fair and equitable apportionment of the sums heretofore paid and hereafter to be paid to her by the trustee for the use of herself and the plaintiff, as directed by the said last will and testament of James H. Young, she has refused and still refuses to comply with said demands.

It is further alleged in said complaint that such action on the part of defendant, Lula E. Young, is a gross abuse of the discretion vested in her by the said will, and is contrary to and in violation of the letter and spirit of said will, and that such action on the part of the said Lula E. Young constitutes a breach of trust, for which plaintiff is entitled to relief by the court, in the exercise of its equitable jurisdiction.

The court below, upon consideration of the demurrers filed by defendants, was of opinion that the complaint herein, in which the foregoing facts are alleged, does not state a cause of action in behalf of plaintiff, for that it appears upon the face thereof that the will of James H. Young vests in defendant, Lula E. Young, the sole discretion of determining the proportion of the net income from said estate that should be used in behalf of plaintiff, and for that there is no method by which the court could determine what proportion, if any, of the amounts paid to Lula E. Young by the trustee for the use of herself and plaintiff should be applied to the use of plaintiff. The demurrers of defendants were accordingly sustained and the action was dismissed at the cost of plaintiff. By his appeal to this Court, plaintiff challenges the correctness of the court's opinion, upon which relief in this action is denied to plaintiff.

Courts exercising equitable jurisdiction have been slow to interfere with a trustee who holds property in trust for another, and who is vested with discretion as to the manner in which his duties with respect to such property shall be performed. When it appears that a trustee has exercised, or proposes to exercise, such discretion in good faith, and with an honest purpose to effectuate the trust, the courts will not undertake to supervise or control his actions. They will not undertake to set aside or over-ride his judgment in matters clearly committed to his discretion, and to substitute therefor the judgment of others, or their own judgment, upon the sole allegation that the action of the trustee is not wise or just. See *Troutt v. Pratt* (Va.), 56 S. E., 165, 8 L. R. A. (N. S.), 398, and case-note. The courts, however, have not hesitated to assume jurisdiction and to grant relief to a *cestui que trust,* when it appears that the trustee has acted in bad faith, or with a fraudulent purpose, to the injury of the *cestui que trust.* See *Collister v. Fassett* (Ct. of App., N. Y.), 57 N. E., 490.

In the latter case a testator by his will had directed his wife, out of property bequeathed to her therein, to use so much thereof for the support and benefit of his niece, as his said wife should from time to time, in her discretion, think best so to do. The Court was of opinion that the wife, defendant in the action, took the residuary estate of the testator charged with the payment of a reasonable amount for the support of the niece, the plaintiff therein, in accordance with the terms of the will, and that as she had failed to exercise the discretion vested in her fairly and honestly, it was competent for a court of equity to ascertain the amount and decree its payment. It was there held that plaintiff was entitled to the payment, not only of an amount reasonably required for her support thereafter, but also of such amount as should have been paid to her prior to the commencement of the action.

In *Albright v. Albright,* 91 N. C., 220, certain lands were conveyed to a trustee to hold for the use and benefit of the wife and children of the trustee, to be equally divided among the children at the death of the trustee and his wife. Full power and authority was vested in said trustee with respect to the management and control of said land by the trustee during his life. It was held that the trustee could be compelled to account to his *cestui que trust* during his lifetime for the rents and profits from said land. It is said in the opinion: "It cannot be contended with the slightest show of reason that the trust contemplates that the trustee shall manage the trust property, let the rents and profits accumulate until he shall die, and then let the same be divided equally among the *cestui que trust.* Such a construction would defeat in large part the generous purpose of the donor to make current provision for his daughter-in-law and grandchildren." In that case relief was granted to plaintiff by means of an injunction and receivership, and by an order for the taking of an account. *Merrimon, J.,* speaking for the Court, says: "However large may be the powers with which a trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the *cestui que trust,* the court will promptly interpose its protective authority."

Defendant, Lula E. Young, holds such sums as have been or shall be paid to her by defendant, Wake County Savings Bank, trustee, as directed by the will, not for her own use, but for the use of herself and the plaintiff, grandson and namesake of the testator. Her refusal and failure to exercise the discretionary power vested in her, with respect to the apportionment of said sums, as she is directed to do by the will, is a breach of trust, resulting to her benefit and to the detriment of plaintiff. The trust is not effectuated, but defeated by her action, which, upon the facts appearing on this record, is in bad faith and fraudulent on her part.

We cannot concur in the opinion that plaintiff has failed to state in his complaint a cause of action upon which a court exercising equitable jurisdiction is powerless to give relief. The manifest purpose of the testator to provide by his will for the support of his fatherless grandson, who resided with him at his home in Raleigh, at the time he executed his will, ought not to be defeated or frustrated by the action of defendant, who in breach of her trust now refuses to perform her plain duty. The courts of this State, fortunately, have the power, upon the facts alleged in the complaint and admitted by the demurrers, to require defendant to perform this duty. They should and will exercise this power, promptly and effectively. No higher obligation rests upon the courts of this State than that which requires them to effectuate the purpose and intent of a testator, clearly expressed in his last will and testament, with respect to the maintenance and support of a dependent child, who was during the lifetime of the testator the object of his affection and solicitude. The courts have ample power to discharge this obligation. This power should be promptly and fully exercised in behalf of the plaintiff herein, to the end that four-fifths of the net income from the trust estate in the hands of defendant, Wake County Savings Bank, shall be applied to the use of defendant, Lula E. Young, and plaintiff, as directed in the will of James H. Young, in fair and equitable proportions, to be determined, in the first instance by Lula E. Young, in the exercise of her discretion, or if she shall fail or refuse to exercise such discretion, fairly and equitably, then by the court, upon all the pertinent facts, as they may be found by the court to be.

The judgment dismissing this action must be

Reversed.

GARNETT JONES WELCH ET AL. v. CHARLES GIBSON ET AL.

(Filed 11 May, 1927.)

1. **Estates—Wills—Devise—Rule in Shelley's Case—Contingent Remainders—Life Estates.**

An estate to the testatrix's daughter for the term of her natural life, and at her death to her bodily heirs as entailed from generation to generation, further qualified so that the living children at the death of the first taker shall share equally: *Held*, those taking under the further limitation do not take as her heirs or the heirs of the ancestor, and interpose a life estate with a contingent limitation over to such of the children living at her death *per capita* and not *per stirpes*, and prevents the application of the rule in *Shelley's case* giving the first taker during her life having living children an absolute fee-simple title.

2. **Same—"Heirs."**

In order for the application of the rule in *Shelley's case* the limitation over to the heirs of the body under a devise must be such heirs as would take (except for the intervention of our statute, C. S., 1734), under the law by descent in the class designated by the will, and where there is a contingent limitation over to those who would take a different estate not *per stirpes*, or as a class different from heirs, the two estates will not merge during the life of the first taker so that he can convey the fee-simple absolute title.

APPEAL by plaintiffs from *Finley, J.*, at April Term, 1927, of MECKLENBURG.

Controversy without action submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey a certain lot of land to the defendant, Charles Gibson, duly executed and tendered a deed therefor and demanded payment of the purchase price as agreed, but the said defendant declines to accept the deed and refuses to make payment of the balance of the purchase price, claiming that the title offered is defective.

It was agreed that if, in the opinion of the court, under the facts submitted, the plaintiffs were able to convey a good and indefeasible fee-simple title to the lot in question, judgment should be entered for the plaintiffs, otherwise for the defendant.

The court, being of opinion that the plaintiffs were not able to convey a good and sufficient fee-simple title, gave judgment for the defendant, from which the plaintiffs appeal, assigning error.

Preston & Ross for plaintiffs.
No counsel appearing for defendant, Charles Gibson.
F. R. McNinch for defendants, Mary S. Hagar and A. B. Hager.

STACY, C. J. On the hearing the sufficiency of the title offered was properly made to depend upon the construction of the following provision in the will of Mary M. Kennedy:

"I will and bequeath to my daughter, Garnette Jones Welch, all of my property, both personal and real, for the term of her natural life, and at the death of my said daughter, Mrs. Welch, all this property so devised shall go to the bodily heirs of Mrs. Welch, and to go as entailed property for succeeding generations; all living children at the death of the said Mrs. Welch are to have an equal share in this property during the term of their lives, and shall go to the heirs of these said legatees from generation to generation forever. No wood shall be sold off this place, and only such wood shall be cut during the lifetime of the said Mrs. Welch, or the minority of her youngest children, only so much as may be necessary for firewood for the house and for the cooking stove."

The fact situation is that Mary M. Kennedy died testate in 1914, leaving an only daughter, Mrs. Garnett Jones Welch, coplaintiff with her husband herein, who now has seven living children, four of whom are infants, and none of whom are parties to this controversy, save the defendant, Mary S. Hager, who was made a party at her own request, and who claims an interest in the land under her grandmother's will.

The plaintiffs claim that Mrs. Garnett Jones Welch acquired a fee-simple title to all her mother's real estate under the above provision of her will, and that the deed tendered is sufficient to convey a good and indefeasible fee-simple title to the lot described therein, while the defendant, Charles Gibson, as well as his codefendant, Mary S. Hager, contends that the *feme* plaintiff, under the above provision of her mother's will, takes only a life estate in the property so devised.

It is conceded that the relative merits of the controversy depend upon whether or not the limitations in the above clause of the will of Mary M. Kennedy to the heirs or heirs of the body of her daughter, Mrs. Garnett Jones Welch, are so framed as to attract the rule announced in the celebrated English case of *Wolfe v. Shelley,* 1 Coke, 93b, commonly known as the rule in *Shelley's case,* which, with us, has become a rule of property as well as a rule of law, and is stated by Mr. Preston, an eminent English authority, as abridged by *Chancellor Kent* in his Commentaries (4 Kent Com., 215), as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 1 Prest. Est., 263. This definition was quoted with approval in *Smith v. Proctor,* 139 N. C., 314.

The origin of the rule, as well as the wisdom of its adoption, has been the subject of much curious and learned speculation. Though found among the remains of feudality, it is neither a relic of barbarism nor a part of the rubbish of the dark ages, but rather a Gothic column, as it were, which has been preserved to aid in sustaining the fabric of our modern social system. *Nicholson v. Gladden,* 117 N. C., 497; *Starnes v. Hill,* 112 N. C., 1; Note, 29 L. R. A. (N. S.), 963; *Daniel v. Bass, ante,* 294; *Foley v. Ivey, ibid.,* 453; *Polk v. Faris,* 9 Yerg., 209; 30 Am. Dec., 400. It prevents the tying up of real estate during the life of the first taker, facilitates its alienation a generation earlier, and at the same time subjects it to the payment of the debts of the ancestor. It also favors dower. *Walker v. Butner,* 187 N. C., 535; *Crisp v. Biggs,* 176 N. C., 1; *Cohoon v. Upton,* 174 N. C., 88.

The effect of the rule, when it applies, is simply this: By force of the limitation to the ancestor's heirs, general or special, the rule in *Shelley's case* operates to give to the first taker, who already has an estate of freehold in the land, the inheritance also, by conferring the remainder on him, as the stock from which alone the heirs can inherit, and the source alone from which their inheritable blood can spring. *Hampton v. Griggs,* 184 N. C., 13; *Jones v. Whichard,* 163 N. C., 241.

It is said by many writers on the subject that the limitation to the heirs unites and coalesces with the limitation of the freehold in the ancestor, and thus operates to vest in the first taker a fee simple or a fee tail, as the case may be, divided or split by intervening limitations, where there are any. *Benton v. Baucom,* 192 N. C., 630. Thus, a gift or a grant to one for life, with remainder to his heirs, gives him a fee simple in possession by the merger of his life estate in the inheritance. But a gift or grant to one for life, remainder to another for life, remainder to the heirs of the first taker, gives to the first taker an estate for life in possession, with a fee simple in expectancy—a merger in this case being prevented by the intermediate life estate. *Hileman v. Bouslaugh,* 13 Pa. St., 344. In such case, however, the ancestor or first taker may deal with the property as full owner thereof, subject only to the intervening life estate and its incidents. *Smith v. Smith,* 173 N. C., 124; *Cotten v. Moseley,* 159 N. C., 1.

A donor or grantor is no more competent to make a tenancy for life a source of inheritable succession than he is competent to create a perpetuity, or a new canon of descent; and the rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property. *Benton v. Baucom,* 192 N. C., 630; *Crisp v. Biggs, supra.* It is one of the ancient landmarks which the fathers have set in the law as it relates to the subject of real property. *Hampton v. Griggs, supra.*

Mr. Tiffany, in his valuable treatise on Real Property, vol. 1 (2 ed.), 529, gives a practical statement of the rule, and discusses its application to various illustrative cases, citing numerous authorities in support of the text, as follows:

"If, after the limitation of a particular estate of freehold in favor of a person, a remainder is limited in favor of his heirs, or the heirs of his body, such person will take an estate in remainder in fee simple or fee tail, according as the limitation in remainder is in favor of his heirs or the heirs of his body, and the particular estate will merge therein, unless another estate be interposed between the particular estate and the remainder.

"In the case of a limitation to A. for life, with remainder to his heirs or to the heirs of his body, which is the typical form calling for an application of the rule in *Shelley's case,* the effect of the rule, it would seem, as above indicated, is not to operate directly upon the life estate in A., but to give to the remainder the effect of a gift to A., the whole limitation taking effect as if it were to A. for life, with remainder to A. and his heirs, or to A. and the heirs of his body. In the remainder in fee or in tail thus vested in A., the estate limited to him for life will merge, and he will consequently take a fee simple or fee tail in possession, while the heirs or heirs of the body will take nothing.

"If, to take another case, the remainder to the heirs or heirs of the body is conditioned on some event, as in the case of a limitation to A. for life, with remainder, if A. shall survive B., to A.'s heirs, or the heirs of his body, A. then has an estate for life, and a remainder in fee or in tail conditioned on his survival of B. In such case, the remainder in favor of A. and his heirs being contingent, the particular estate will not merge therein, but, upon the vesting of the remainder by the death of B. before A., merger will take place, and A. will have, as in the previous case, an estate in fee simple or fee tail in possession.

"If there is an intermediate estate interposed between the life estate in the ancestor and the remainder to the heirs, as in the case of a limitation to A. for life, remainder to B. for life or in tail, remainder to the heirs of A., or to the heirs of A.'s body, A. will then have a remainder in fee or in tail, as in the previous cases. The vested remainder in B., however, interposed between A.'s life estate and his remainder in fee or in tail, will prevent the merger of the life estate in the remainder. In such case, if the remainder in B. should terminate before the end of A.'s life estate, this latter will then merge in the fee simple or fee tail of A. If the remainder interposed in favor of B. is a contingent and not a vested remainder, while A.'s life estate and his remainder in fee or in tail are united in him, the former is not absolutely merged in the latter, and they become separated upon the vesting of B.'s estate.

"The application of the rule is not affected by the presence of a power of appointment, the exercise of which would destroy the limitation in favor of the heirs or heirs of the body. For instance, in the case of a devise to A. for life, with power to convey in fee simple, and after A.'s death to A.'s heirs, the rule will apply to the same extent as if no power had been given to A.

"The particular estate in the ancestor and the remainder in favor of the heirs must arise under the same instrument, and so the rule will not apply; for instance, when A., being tenant for life, with remainder to the heirs of B., conveys his life estate to B. The opinion has been expressed that an estate created by the exercise of a power contained in the instrument by which the particular estate is created, is to be regarded as arising under the same instrument for the purposes of this requirement. This opinion has, however, been questioned.

"The rule does not apply, it has been decided, if the limitation by way of remainder is to the heirs of the body of both the donee of the particular estate and of another person, as when there is a gift to a man for life, with remainder to the heirs of the bodies of such man and his present wife. This is not the same as a gift to a man with remainder to the heirs of the body of such man by his present wife, since in the former case the heirs are to be ascertained upon the death of the last survivor of the husband and wife, while in the latter case they are to be ascertained upon the death of the husband. In the latter case the rule would apply.

"The rule has been held to apply in the case of a limitation by devise in favor of the 'heir' or 'heir male,' in the singular number, of the person first named, as well as when in favor of his heirs or heirs of the body."

In the case at bar, the devise is to the plaintiff for the term of her natural life, and at her death it is provided that all the property so devised "shall go to the bodily heirs of Mrs. Welch, and to go as entailed property for succeeding generations." Had the will stopped here, under all the decisions, a typical case for the application of the rule would have been presented, for, as said by *Black, J.*, in *Steacy v. Rice,* 27 Pa. St., 95; 67 Am. Dec., 447, "the law will not treat that as an estate for life which is essentially an estate of inheritance, nor permit anyone to take in the character of heir unless he take also in the quality of heir." *Hartman v. Flynn,* 189 N. C., 452; *Bank v. Dortch,* 186 N. C., 510. In other words, an *heir* is one upon whom the *law* casts an estate at the death of the ancestor (II Blackstone, ch. 14), and as it is necessary to consult the law to find out who the heir of the ancestor is, the law, speaking through the rule in *Shelley's case,* in substance, says:

"He who would thus take in the character of heir must take also in the quality of heir; that is, *as heir* by descent under the law and not by purchase under the instrument." *Yelverton v. Yelverton,* 192 N. C., 614. But immediately the testatrix added: "All living children at the death of the said Mrs. Welch are to have an equal share in this property during the terms of their lives." From this limitation, it would seem that the testatrix intended to vest in the children of Mrs. Welch, living at her death, in equal shares, contingent remainders in the property, thus taking the case out of the operation of the rule, so far as the devise to the plaintiff is concerned. *Williams v. Sasser,* 191 N. C., 453; *Haar v. Schloss,* 169 N. C., 228; *May v. Lewis,* 132 N. C., 115; *Sessoms v. Sessoms,* 144 N. C., 121. And while in the first instance she apparently used the words "bodily heirs" in a technical sense *(Blake v. Shields,* 172 N. C., 628), yet, in the very next clause, it clearly appears, we think, that she had in mind the children or issue of her daughter, Garnett Jones Welch, living at her death, who were to take *per capita* and not *per stirpes. Burton v. Cahill,* 192 N. C., 505; *Pugh v. Allen,* 179 N. C., 307.

It has been held in England, ever since the leading case of *Wright v. Jesson,* in the House of Lords, 2 Bligh., 2, which overruled *Doe v. Wright,* in the King's Bench, 5 M. and S., 95, that the words "equally to be divided," or "share and share alike," superadded to the limitation to the heirs, or to heirs of the body, do not prevent the application of the rule, and such was declared to be the law of this State in *Ross v. Toms,* 15 N. C., 376, a case decided prior to the Act of 1784, now C. S., 1734. But in *Ward v. Jones,* 40 N. C., 400, decided in 1848, and expressly followed with approval in *Mills v. Thorne,* 95 N. C., 362, *Gilmore v. Sellers,* 145 N. C., 283, and *Haar v. Schloss,* 169 N. C., 228, it was held "that in all devises of land, made since that time (1784), the words 'to be equally divided' prevent the application of the rule in *Shelley's case,* and that the first taker has only an estate for life." Further animadverting on the subject, *Pearson, J.,* delivering the opinion of the Court, said: "The rule in *Shelley's case* only applies when the *same persons* will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent, it being more favorable to dower, to the feudal incidents of seigniories, and to the rights of creditors, that the first taker should have an estate of inheritance; but when the persons taking by purchase would be different, or have different estates than they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills, take as purchasers. The words 'to be equally divided between the issue' take in *different persons* than simply the word 'issue,' used as a word of descent; for, in the latter case, the person or persons to take would be ascertained by the rules of descent—there would be representation—and the taking would be *per stirpes;* while in the former the rules of descent would have no application, and there must be an equal division *per capita.* Hence, the use of these words prevents the application of 'the rule,' and the first taker has but an estate for life, except in cases where there is some paramount intent which would be defeated unless the first taker be entitled to an estate of inheritance."

The sense in which the words "heirs" or "heirs of the body" are employed, whether technical or other, is the controlling factor in determining the applicability or nonapplicability of the rule in *Shelley's case. Hampton v. Griggs, supra.* "In determining whether the rule in *Shelley's case* shall apply, it is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. The material inquiry is, What is taken under the second devise? If those who take under the second devise take the same estate they would take as heirs or heirs of his body, the rule applies"; otherwise, not. *Crockett v. Robinson,* 46 N. H., 454.

In the first limitation to the bodily heirs of Mrs. Welch it is provided that the estate shall go as "entailed property," while in the ulterior limitation it is apparently released from its character as entailed property and limited generally to the "heirs of these said legatees." The will was drawn by a justice of the peace, who, it seems, according to the contention of the defendant, "overspoke himself," or got lost in a multiplicity of words. At least, his arrangement of legal expressions has had a puzzling effect upon those who have been asked to find out their meaning, when so arranged, and to advise accordingly. "A little learning is a dangerous thing," says Pope, which properly interpreted means that expert knowledge in the hands of an inexpert is a dangerous thing. And so it is. But in the language of Huxley, "If a little knowledge is dangerous, where is a man who has so much as to be out of danger" when he is dealing with the rule in *Shelley's case?* Or forsooth did the student answer with a correct guess, when, on being asked the meaning of the rule, he said: "The rule in *Shelley's case* is very simple if you understand it. It means that the same law which was applied in that case applies equally to every other case just like it."? And so it does. But when is a case "just like it," or so nearly so as to come within the operation of the rule? That is the puzzling question.

Appellees further point out that the will contains a prohibition against selling wood from the place during the lifetime of Mrs. Welch, which, they say, shows a clear intent on the part of the testatrix that the first devise should be limited to a life estate. 2 Minor's Institutes, 400, *et seq.*

The cases of *Rollins v. Keel,* 115 N. C., 68, *Puckett v. Morgan,* 158 N. C., 344, *Jones v. Whichard,* 163 N. C., 241, *Pugh v. Allen,* 179

N. C., 307, *Blackledge v. Simmons,* 180 N. C., 535, *Wallace v. Wallace,* 181 N. C., 158, *Reid v. Neal,* 182 N. C., 192, and *Hampton v. Griggs,* 184 N. C., 13, are cited as supporting, in tendency at least, the judgment entered in the court below. The distinction between this line of cases, in which the rule has been held not to be applicable to the limitations appearing therein, and the long line of decisions in which it has been held to be applicable and firmly established as the law of this jurisdiction, was first pointed out in *Pugh v. Allen, supra,* and repeated in *Hampton v. Griggs, supra,* substantially as follows: When there is an ulterior limitation which provides that upon the happening of a given contingency, the estate is to be taken out of the first lines of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, this circumstance may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other indicia, it has been held sufficient to show that the words "heirs" or "heirs of the body" were not used in their technical sense. Herein lies the distinction between the cases above mentioned and *Benton v. Baucom,* 192 N. C., 630, for in this latter case, the ulterior limitation was to the testator's own three children by a former marriage, who were not among the heirs general of his stepdaughter, the first taker, for she was the daughter of testator's second wife by a prior marriage, a circumstance not fully elaborated in that case.

As the judgment appears to be correct, it is approved.

Affirmed.

C. E. BARBER v. SOUTHERN RAILWAY COMPANY.

(Filed 11 May, 1927.)

1. **Negligence—Railroads—Crossing—Watchmen—Warnings — Contributory Negligence—Evidence—Questions for Jury—Nonsuit.**

Where a railroad company has for some time kept a watchman to warn travelers of danger from crossing its tracks at a public street or highway, and this is known to the plaintiff, who was injured by a rapidly moving train while attempting to cross in an automobile on a dark, rainy day with the isinglass curtains up, the absence of the watchman and the consequent failure to give warning is an implied invitation to the traveler to cross, which may be considered by the jury upon the question of whether the person thus crossing the track had exercised ordinary care under the circumstances, or had by failing to use such care contributed to his own injury, and the defendant's motion as of nonsuit upon the evidence is properly denied. C. S., 567.

2. Same—Stopping Before Crossing Railroad Track.

Whether one driving an automobile across a railroad track at a public crossing negligently contributes to his own injury by failing to come to a complete stop before attempting to do so, depends upon whether under the circumstances he should have stopped in the exercise of ordinary care for his own safety.

3. Appeal and Error—Instructions—Record—Presumptions.

Where the charge of the court to the jury does not appear in the record of the case on appeal, the presumption is in favor of its correctness on every phase of the law arising under the evidence.

4. Negligence—Evidence—Attention to Injured Persons.

Evidence that the defendant in an action to recover damages for an alleged negligent injury to the plaintiff, carried him to a hospital and furnished him with medical care, is inadmissible upon the issue of negligence.

5. Appeal and Error—Objections and Exceptions—Evidence—Broadside Exceptions—Instructions—Issues—Negligence.

Where evidence is competent to be considered by the jury upon one of the issues properly submitted, and not upon another, the appellant must aptly request the trial judge to confine it to the proper issue in order to avail himself of his exception on appeal.

APPEAL by defendant from *Oglesby, J.*, and a jury, at November Term, 1926, of ROCKINGHAM. No error.

This is an action for actionable negligence, brought by plaintiff against defendant. The defendant plead contributory negligence. The issues were the usual ones in such cases: (1) negligence, (2) contributory negligence, (3) damages, and were answered in favor of plaintiff, and damages awarded. The material facts will be considered in the opinion.

Glidewell, Dunn & Gwyn for plaintiff.
Ivie, Trotter & Johnston for defendant.

CLARKSON, J. The injury to plaintiff occurred where the north and southbound main lines and sidetrack of the defendant Southern Railway Company crossed Settle Street in Reidsville, N. C. East Market Street runs parallel with the railroad, and on the east side of the tracks. A watchman's shanty is at the mouth of Settle Street on Market Street. Plaintiff, on the evening, between 2 and 3 o'clock, of 16 November, 1920, was driving a Buick touring car with the curtains on containing isinglass windows. Beside him was his son, and in the rear seat was another boy, Scott Fillman. It was foggy, pouring down rain, cold, and rain coming from the east. The passenger train was some 35 minutes late, running about 50 miles an hour at full speed when plaintiff was struck. Plaintiff, coming down East Market Street, near Settle Street crossing, slowed up his car, waiting for a long freight train, about 70 cars, to pass, going south, which was making the usual roaring noise, and for everything to get clear. Before he turned from East Market Street into Settle Street, he looked, glanced back, and could see some 75 yards. As he started to turn he looked for the watchman—could see through the glass, the whole street was clear. Leaned over and looked south down railroad track to the left—the track was clear, could see down some 60 yards. When he proceeded to cross Settle Street he was running about 5 miles an hour. Just as he got up on the first track, he heard a danger signal of several sharp blasts of the whistle of the train coming from the south, and about the time he saw the watchman coming half-running from the opposite side of Settle Street, that he had started to cross, hollowing "Stop." He stopped as quick as he could, reversed his car, and backed back about four feet, and while moving back the passenger train struck the front end of the car. The car was knocked about 60 feet. The Fillman boy was killed, plaintiff was seriously injured, and the car torn to pieces. The watchman's shanty was knocked off its foundation by the automobile, which was knocked about 60 feet.

Plaintiff testified that *on a clear day* a man on East Market Street could see the train a quarter of a mile. No obstruction in the way to cut off view of train coming from the south. It was in evidence that the defendant kept a watchman at Settle Street crossing, which was known to plaintiff.

The defendant introduced no evidence; (1) made a motion, at the close of plaintiff's testimony, for judgment as in case of nonsuit, C. S., 567; (2) requested the court below to charge the jury, "If you believe the evidence, you will answer the second issue 'Yes'" (contributory negligence issue). Both requests refused, and exceptions taken by defendants and errors assigned.

The defendant also excepted and assigned error to the charge of the court below as follows: "Our law has also said that where a railroad company maintains a flagman at a railroad crossing, whether voluntarily or by law or custom, the public generally has a right to presume that this safeguard will be reasonably maintained and attended to, and in the absence of knowledge to the contrary, the fact that the flagman is absent from his post, or, if present, is not giving the warning of danger, is an assurance of safety and an ample invitation to cross, upon which a traveler familiar with the crossing may rely and act, within reasonable limitations, on the presumption that it is safe for him to go on the crossing."

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

We think the court below correct on all three propositions. There was sufficient evidence to be submitted to the jury on the issues both of negligence and contributory negligence. As to the charge as given, Sherman & Redfield on the Law of Negligence, 2d vol. (6 ed.), p. 1158, citing a wealth of authorities, lays down the rule as follows: "Where a railroad company is under no original obligation to station a flagman at a particular crossing, yet if it has done so for a long time, travelers have a right to presume, in case of his absence, that the road is clear."

In *Shepard v. R. R.,* 166 N. C., at p. 545, the following is quoted with approval: "In 33 Cyc., at p. 1028, the author, speaking to this question, says: 'Where a railroad company maintains a flagman, gates, or other signals of warning at a railroad crossing, whether voluntarily or by law or custom, the public generally has a right to presume that these safeguards will be reasonably maintained and attended, and in the absence of knowledge to the contrary, the fact that the gates are open, or automatic bells not ringing, or that the flagman is absent from his post, or, if present, is not giving a warning of danger, is an assurance of safety and an implied invitation to cross upon which a traveler familiar with the crossing may rely and act, within reasonable limits, on the presumption that it is safe for him to go on the crossing. The extent to which a traveler may rely on such assurance is a question of fact, and while ordinarily the same degree of care and vigilance is not required of a traveler under such circumstances as otherwise, he has no right to rely exclusively upon such circumstances, nor will such presumption or assurance excuse the traveler from using every reasonable precaution that an ordinarily prudent man would use under like circumstances. Such facts as the absence or presence of a flagman, or that the gates are open, or that the automatic bells are ringing or not ringing, are merely facts to be considered in determining whether the traveler exercised the degree of care required in attempting to cross.' "

The charge of the court below not being in the record, the presumption of law is that the court below charged the rule of the prudent man under the facts and circumstances of the case.

We think the refusal of the court below to nonsuit plaintiff and give defendant's prayer for instruction, and the charge as given, fully supported by the authorities in this jurisdiction. In *Shepard v. R. R., supra,* at p. 545, it is said: "It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances to each particular case, and so is usually a question for the jury.' *Alexander v. R. R.,* 112 N. C., 720; *Judson v. R. R.,* 158 N. Y., 597; *Malott v. Hawkins,* 159 Ind., pp. 127-134; 3 Elliott on Railroads (2 ed.), sec. 1095, note 147; 33 Cyc., pp. 1010, 1011-1020." *Perry v. R. R.,* 180 N. C., 290; *Parker v. R. R.,* 181 N. C., 95; *Jackson v. R. R., ibid.,* p. 153; *Williams v. R. R.,* 182 N. C., at p. 274; *Rigsbee v. R. R.,* 190 N. C., p. 231.

It was in evidence that immediately after plaintiff's injury he was put in the baggage car of the train by defendant company and carried to the general hospital at Danville, Va. Dr. Miller treated him there. Plaintiff testified:

"Q. Who employed Dr. Miller? Who sent you to Dr. Miller? Objection by defendant; overruled; exception. Witness allowed to answer as follows: A. The railway company. Defendant moves that the answer be stricken out; overruled; exception." Assignments of error were duly made.

The above exceptions present a serious legal question, and we would hold it error but for the fact that the plaintiff alleged in the complaint that he was permanently injured, which was denied by defendant in its answer. The question and answer were competent on the question of injury.

The defendant, as the record shows, entered a general exception to the admission of this testimony on trial, and did not ask that it be restricted for the purpose for which it was competent, and requested no special instruction in regard to it. Its admission, therefore, is not assignable error. Latter part of Rule 21 of Practice in the Supreme Court, 192 N. C., at p. 850, is as follows: "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted." *Hill v. Bean,* 150 N. C., 436; *Beck v. Tanning Co.,* 179 N. C., 126.

"In an action by a servant for personal injury, it was error to permit evidence that the defendant had furnished plaintiff a nurse, as tending to show a recognition of liability." *Sias v. Consolidated Lighting Co.* (Vt.), 50 At. Rep., 554. "For one, after driving over a street sweeper, to come back and say that if he was hurt, he would be glad to do anything he could for him, and, after his wound was dressed, to go to his house and give him ten dollars and ask if he could do anything more for him, is not an admission of negligence." *Smith v. Bailey,* 43 N. Y. Supp., p. 856; *Grogan v. Dooley,* 211 N. Y. Court of Appeals, p. 30; *Wilson v. Daniels* (Mass.), 145 N. E., p. 469.

If defendant had asked that the testimony be restricted for the purpose of showing injury, which defendant denied, or had asked for instruction to that effect, and this had been refused by the court below, we would have held it error and granted a new trial. The defendant, not knowing whether it was liable or not, had the humanity to take plaintiff, who was struck by its engine, to a hospital in Danville and employed Dr. Miller to attend him. It was an act of mercy which no court should hold in any respect was an implied admission or circumstance tending to admit liability. If a court should so hold, it would tend to stop, instead of encourage, one injuring another from giving aid to the sufferer. It would be a brutal holding, contrary to all sense of justice and humanity. If proper request had been made by defendant for the evidence to be restricted as required by the rule, we are satisfied that the careful and able judge who tried the case in the court below would have complied with the rule.

In the other assignments of error, we can see no new or novel proposition of law, nor do we think that they are material.

For the reasons given, we can find

No error.

CORPORATION COMMISSION v. MERCHANTS BANK AND TRUST COMPANY.

(Filed 11 May, 1927.)

1. **Banks and Banking—Depositors—Debtor and Creditor—Receivers—Assets—Agreements—Trusts—Priority of Payment.**

Where money is deposited in a bank, without agreement with the bank that it was to be held for a specified purpose or segregated from its other deposits therefor, the deposit is a general one and becomes a part of the bank's assets subject to checks of its other depositors, and not a naked bailment requiring that it be kept intact as a trust for a certain designated use, and as a general deposit, it is not entitled to priority of payment over the other like creditors of the bank in the hands of a receiver.

2. **Same—Trusts—Bailment—Title.**

Where by agreement with its depositor a bank receives a deposit to be applied only to a debt of the depositor to another, a naked bailment arises as a matter of law and the bank does not acquire title, and is liable for its misapplication to the payment of the checks of other general depositors out of its assets, which liability passes to its receiver in insolvency, creating a preference.

3. **Same—Trustee's Breach of Trust—Following Trust Property—Innocent Purchaser or Transferee.**

Where a bank has converted money upon special deposit with it as a trust fund by commingling it with its assets and paying it out upon the checks of its general depositors, and has since become insolvent and in a receiver's hands, the special depositor may claim a preference of payment out of the funds in his hands under the equitable principle that a trust fund when converted to other purposes may be followed unless transferred to a bona fide purchaser or assignee for value, without notice.

4. **Same—Evidence—Questions for Jury—New Trials.**

Where suit is brought to subject the assets of a bank in a receiver's hands to the payment of a special deposit as a preference over other deposits, or the claims of its general creditors, and the evidence is conflicting as to whether a trust fund had been created by the agreement of the parties, the question is one for the jury, and an instruction in effect directing a verdict upon the evidence is reversible error upon which a new trial will be granted.

APPEAL by Guaranty Company of Maryland from *Finley, J.,* at February Term, 1927, of FORSYTH.

A. Lamas gave to Frank L. Blum & Company a contract for constructing a brick building in Winston-Salem, and borrowed $28,200 from the Guaranty Company of Maryland, herein called the claimant, for which Lamas and his wife executed to the claimant their note and deed of trust in the sum of $30,000. The claimant then deposited with the Citizens National Bank of Baltimore to the credit of the Merchants Bank and Trust Company its check on the Baltimore Commercial Bank for $28,200. When the Merchants Bank and Trust Company was notified of this deposit, it opened this account on its own books: "Merchants Bank and Trust Company and Randall Brooks, trustee for A. Lamas," and on 12 January, 1926, credited this account with $28,200.

The claimant alleged that it had an arrangement with the Merchants Bank and Trust Company by which Blum & Company could obtain from the Bank and Trust Company under the loan the amount called for from time to time in orders to be signed by Macklin, the architect, and that up to the time the doors of the Bank and Trust Company were closed, $14,567.93 of this fund had been drawn out by Blum & Company, leaving $13,632.07 to the credit of the Merchants Bank and Trust Company and Randall Brooks, trustee. It was alleged by the claimant that on 10 May, 1926, he deposited $13,632.07 in the Peoples National Bank, Winston-Salem, and that all interested parties thereupon agreed that the deposit in the Merchants Bank and Trust Company, under the name of the "Merchants Bank and Trust Company and Randall Brooks, trustee for A. Lamas," should become the property of the claimant.

The Wachovia Bank and Trust Company was appointed receiver of the Merchants Bank and Trust Company, and Forrest G. Miles, acting for the receiver, made a report, to which the claimant excepted, demanding a trial by jury of the issues involved. C. S., 1211, 1212, 1213. By consent, the answers to the first, second, third, fifth, sixth, seventh, eighth, ninth, and tenth issues established these facts: The incorporation of the Merchants Bank and Trust Company, its insolvency, and the appointment of the Wachovia Bank and Trust Company as receiver; the deposit by the claimant of $28,200; the unapplied balance of $13,632.07; the assignment thereof to the claimant; the sum of $28,200 deposited with the understanding and agreement that the Merchants Bank and Trust Company was to act as trustee of the fund and disburse it according to a letter bearing date 7 February, 1926, and set out in the record; the deposit not subject to check by the claimant and Lamas, or of either of them; and the cash turned over to the receiver by the Merchants Bank and Trust Company amounting to $35,583.32. The jury answered the fourth, eleventh, twelfth, and thirteenth issues as follows:

4. Were the assets of the Merchants Bank and Trust Company augmented thereby to an amount equal to the liability incurred? Answer: Yes.

11. Did the title to the sum of $28,200 pass to the Merchants Bank and Trust Company? Answer: Yes.

12. Was it the intention of the parties that the proceeds of the deposit in the Citizens National Bank of Baltimore be commingled with the other funds of the Merchants Bank and Trust Company, pending withdrawals, and used by the Merchants Bank and Trust Company in the customary way and for its general banking purposes? Answer: Yes.

13. Was it contemplated by the parties to segregate the proceeds of the deposit in the Citizens National Bank of Baltimore from the other funds of the Merchants Bank and Trust Company? Answer: No.

The claimant excepted to the last three issues, and to the court's refusal to submit the following: "Was the $28,200 deposited with the Merchants Bank and Trust Company as a trust fund, to be applied by it according to the terms set forth in the letter bearing date of 7 January, 1926?" It excepted also to the denial of judgment for the claimant upon the verdict.

It was adjudged upon the verdict that the claimant is not entitled to have its claim allowed as a priority, but only as a general unsecured claim, and to the judgment the claimant excepted, assigning error.

Parrish & Deal for claimant.

Manly, Hendren & Womble for Wachovia Bank and Trust Company, receiver.

ADAMS, J. The central question turns upon the nature of the transaction between the claimant and the Merchants Bank and Trust Company. Considered in view of the evidence and the verdict, what did the transaction amount to in contemplation of law? The answer involves preliminary inquiry into the nature of the deposit—whether it was general or special, or whether it was a deposit for a specific purpose.

A general deposit is the payment of money into a bank to be repaid upon demand; the deposit creates between the bank and the defendant the relation of debtor and creditor; the relation is legal; the money passes from the depositor to the bank, and is mingled with other money, the entire amount forming a general fund from which depositors are paid. Deposits of this character are free from any "trust quality," and the depositor, in the event of the bank's insolvency, has no right of preference, but must share pro rata with general creditors. *Boyden v. Bank,* 65 N. C., 13; *Lilly v. Comrs.,* 69 N. C., 300; *Ruffin v. Comrs., ibid.,* 498; *Hawes v. Blackwell,* 107 N. C., 196.

A special deposit is a deposit for safe-keeping, to be returned intact on demand—a naked bailment, the bank acquiring no property in the thing deposited and deriving no benefit from its use. The title remains in the depositor, who is a bailor and not a creditor of the bank. *Boyden v. Bank, supra;* 3 R. C. L., 517; 7 C. J., 630.

A deposit for a specific purpose is made when money or property is delivered to a bank to be applied to a designated object, or for a purpose which is particularly defined, as, for example, the payment by the bank of a specified debt. It is neither general nor wholly special. It partakes of the nature of a special deposit to the extent that the title remains in the depositor, and does not pass to the bank. The consequence is that the money, if not applied, or if misapplied, may be recovered as a trust deposit. 7 C. J., 631; 1 Morse Banks and Banking, sec. 185. In *Morton v. Woolery,* 24 A. L. R., 1107, it is said: "Where money is deposited for a special purpose, as, for instance, in this case, where it was deposited for the stated purpose of meeting certain checks to be thereafter drawn against such deposit, the deposit does not become a general one, but the bank, upon accepting the deposit, becomes bound by the conditions imposed, and, if it fails to apply the money at all, or misapplies it, it can be recovered as a trust deposit. *Hitt Fireworks Co. v. Scandinavian American Bank,* 114 Wash., 167; 195 Pac., 13; 196 Pac., 629; *Dolph v. Cross,* 153 Iowa, 289; 133 N. W., 669; *First Nat. Bank v. Barger,* ...... Ky., ...; 115 S. W., 726; *Smith v. Sanborn State Bank,* 147 Iowa, 640; 30 L. R. A. (N. S.), 517; 140 Am. St. Rep., 336; 126 N. W., 779. See, also, *Russell v. Bank of Nampa,* 31 Idaho, 59; 169 Pac., 180; *First Nat. Bank v. Miller,* 46 N. D., 551; 179 N. W., 997; 7 C. J., 632." For further discussion, see *Webb v. Newhall,* 26 A. L. R., 1; *Re Interborough Con. Corporation,* 32 A. L. R., 932; *So.*

Ex. Bank v. Pope, 108 S. E., 551; *Williams v. Bennett,* 123 S. E., 683; *Sawyer v. Connor,* L. R. A., 1918 A, 61.

As a general rule, if property is converted and the trust fund can be traced and identified, the *cestui que trust* may resort to a court of equity to compel its transfer to himself, and his right will not be affected by any change in the trust property wrought by the trustee without his consent, unless it has been transferred to a bona fide purchaser, or assignee, for value without notice. 2 Pomeroy's Eq. Jur., sec. 1058; *Whitley v. Foy,* 59 N. C., 34; *Barnard v. Hawks,* 111 N. C., 333; *Edwards v. Culberson, ibid.,* 342. But the point in controversy here is whether the claimant can impress a trust upon certain assets of the insolvent bank now in the hands of the receiver; and with respect to these assets, the controlling facts are that the title to the deposit passed to the Merchants Bank and Trust Company, and that the parties intended that the proceeds of the deposit should be not segregated, but commingled with other funds and used by the bank pursuant to custom in its general banking business. These facts, established by the verdict, are wholly inconsistent with the notion of bailment, agency, or the creation of a trust. In *Bank v. Davis,* 114 N. C., 344, it is said that the test is whether there was an agreement, express or implied, that the fund should not be held as a special deposit, but should be mingled with the other funds coming into the bank and used in the transaction of its business. The conclusion is that his Honor was right in declining to sign the judgment drafted upon the undisturbed verdict and tendered by the plaintiff.

But the appellant has other exceptions which are more serious. Upon the last three issues, this instruction was given the jury: Upon all the evidence, if you believe it, you will answer the eleventh issue "Yes," the twelfth "Yes," and the thirteenth "No." In this there is error. Without regard to the suggestion that the wording of the instruction is subject to criticism *(Alexander v. Statesville,* 165 N. C., 527; *S. v. Loftin,* 186 N. C., 205), we find that the evidence relating to these issues is so inconsistent and conflicting as to require its submission to the jury. *Lamb v. Perry,* 169 N. C., 436; *Lassiter v. R. R.,* 171 N. C., 283; *Evans v. Lumber Co.,* 174 N. C., 31. As to these three issues there must be a new trial. We find no error in submitting the fourth, and none in declining the issue tendered by the appellant. Of course, the issues which were answered by consent will not be disturbed.

Partial new trial.

STATE v. CHARLIE JOHNSON.

(Filed 11 May, 1927.)

1. **Homicide—Murder—Evidence—Corpus Delicti—Appeal and Error.**

Where a prisoner upon a trial for a homicide has been convicted of murder in the first degree under sufficient evidence to sustain the verdict, including that tending to show that he shot the deceased with a pistol, and the deceased threw up his hands and fell with "his brains working out of his head," with reference in the record to the death of the deceased which appears not to have been questioned on the trial as a result from the pistol shot: *Held*, the *corpus delicti* has been made sufficiently on appeal where the point has first been raised in the Supreme Court.

2. **Homicide—Murder—Evidence—Alibi—Questions for Jury.**

Where the defense of an alibi is relied on upon the trial for a homicide, conflicting evidence of the State as to whether one of its witnesses could have been correct in his testimony that he had seen the defendant at the place of the crime at its occurrence in connection with the testimony of another of its witnesses tending to show its impossibility, is one for the jury.

3. **Instructions—Criminal Law—Statutes—Special Requests—Appeal and Error.**

While the judge is required by our statute, C. S., 564, to explain the law to the jury arising from the evidence in the particular case that is essential to constitute a homicide, it is required of the prisoner to offer a request for special instructions as to its application in more specific detail, when the charge is substantially correct.

4. **Evidence—Criminal Law—Character—Instructions.**

Where the prisoner on trial for a homicide has admitted when a witness in his own behalf, that he had been imprisoned several times for breaking the criminal law in other and minor offenses, an instruction stating these admissions and confining them as evidence only in relation to the truth of his other testimony is not error.

5. **Instructions—Contentions—Appeal and Error.**

Where the trial judge has stated the contentions of the opposing party, the appellant insisting upon a prejudicial error therein must have called it to the attention of the judge at the time to afford him an opportunity for correction, or the matter will not be considered on appeal.

6. **Appeal and Error—Instructions—Presumptions.**

Where the instructions of the trial judge to the jury are not made to appear in the record on appeal, they will be presumed to have been correctly given.

7. **Appeal and Error—Harmless Error—Instructions—Evidence.**

Where the judge in his instructions to the jury correctly refers to evidence, but as having been testified to by a witness by name, whose name does not appear in the record on appeal, an exception taken for the first time in the Supreme Court will not be considered.

8. Appeal and Error—Objections and Exceptions—Briefs.

Exceptions not referred to in the appellant's brief will be deemed to have been abandoned on appeal.

CRIMINAL ACTION, tried before *Webb, J.*, and a jury, at October Term, 1926, of MECKLENBURG. The prisoner was indicted and prosecuted for the murder of one John W. Daniels, and was duly convicted of murder in the first degree, whereupon sentence of death was pronounced upon the verdict, as provided in C. S., ch. 83, Art. 17, and he appealed to the Supreme Court, assigning for error the exceptions set forth in the opinion.

Attorney-General Brummit and Assistant Attorney-General Nash for the State.

Tom P. Jimison, Flowers & Boyd, and Preston & Ross for the prisoner.

ADAMS, J. The evidence offered by the State tended to show that at the time of the trial the prisoner was about forty years of age, had been married twenty years, and had spent one-half his married life in prison. He was released on 16 April, 1926, and the next day returned to his dwelling at 506 East First Street, in the city of Charlotte, then occupied by his wife, his children, and his son-in-law. His house was on one side of the street and on the other side, in a diagonal direction, was Kelly's Market. This market and the store of the deceased were on the same lot. Soon after his return to Charlotte, the prisoner, in the presence of J. D. Oliver, said that the deceased had "turned him up" for assaulting one of the guards when he escaped from prison, had called the police, and that "he was going to kill him for it." At midnight, 5 June, 1926, as the deceased, with a package in his hand, came from Kelly's Market the prisoner appeared, crossed the street, met the deceased, and shot him with a pistol.

The defense was the general plea, based upon an alibi. The prisoner and the members of his family who testified in his behalf said that he came home in the afternoon, ate his meal, took a bath, retired at half past nine, and remained in bed until a few minutes after the homicide, when his wife waked him; that he did not have a pistol; that his relations with the deceased had been friendly; that he had made no threat, and that he did not fire the fatal shot.

In homicide the *corpus delicti* consists of two fundamental facts, the death and the criminal agency as its cause; and upon the State rests the burden of proving each of these facts beyond a reasonable doubt. As a rule, it is not enough merely to show that the body is missing; there must be proof also of death. Clark's Crim. Law, 158; *S. v. Long,* 2 N. C., 456; *S. v. Williams,* 52 N. C., 446. Accordingly, the prisoner first contends that the State has offered no adequate proof that the wound was mortal. This position is based upon a hyper-critical interpretation of the evidence. In addition to direct testimony that the prisoner shot John W. Daniels in the head with a pistol, that Daniels threw up his hands and fell on his face, and that "his brains worked out of his head," there are references in the record to the "death of the deceased," and to the time of the "killing." That death instantly followed the infliction of the wound seems not to have been questioned at the trial, and the point now made that proof of the *corpus delicti* is wanting is manifestly without merit.

Subject to the prisoner's exception, evidence was admitted which tended to show that about three months before the homicide the prisoner declared his intention and purpose to kill the deceased, the assigned reason being that the deceased had caused him to be returned to the chain-gang after he had escaped. The prisoner not only objected to the introduction of the evidence, but afterwards moved to strike it from the record. He now insists that according to the testimony of F. B. Blythe, foreman of the convict camp, he was released from prison 16 April, 1926, and therefore could not have been in Charlotte at the time the declaration was alleged to have been made. Oliver, who testified as to the declaration, said that if he was mistaken as to the date, he was not mistaken as to the man. Whether Oliver was mistaken was a question for the jury; the testimony, though contradicted, was none the less competent. But it is contended for the prisoner that it was the duty of his Honor in charging the jury to direct attention to the conflict between the testimony of Oliver and Blythe; that this was not done, and that the failure to do so is reversible error. Specifically, it is contended that the judge did not state in a plain and correct manner the evidence in the case, and declare and explain the law arising thereon. C. S., 564. Both in criminal and in civil causes it is the duty of the trial judge to present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect; but when the judge has done this, if a litigant desires that some subordinate feature of the cause, or some particular phase of the testimony, be more fully explained, he should call the court's attention to it by appropriate prayers for instructions, or other proper procedure. *S. v. Merrick,* 171 N. C., 788; *S. v. Thomas,* 184 N. C., 757; *S. v. O'Neal,* 187 N. C., 22. If Oliver was incorrect as to the date of the alleged declaration, and Blythe was correct as to the time the prisoner was released, the conflict involved only a "subordinate feature of the cause" or a "particular phase of the testimony," concerning which the prisoner should have requested definite instructions. In the cases of Merrick and Thomas, new trials were granted because in each case a substantial feature of the law had been omitted from the instructions given the jury; in *O'Neal's case* a new trial was refused for the reason that the exception related to a subordinate matter, in reference to which no special instruction had been requested. It should be observed, however, that the charge contains a complete statement of the prisoner's contentions, and his denial of the material circumstances on which the State relied. The cases last cited are also decisive authority for overruling the prisoner's exception to the instruction on the question of reasonable doubt. The instruction did not attempt a definition of the term, and this the prisoner assigns for error, although he made no request and tendered no prayer for a particular formula or a more comprehensive definition. *S. v. Lane,* 166 N. C., 333.

The following paragraph appears in the charge to the jury: "The defendant says and contends that while he has been a man of bad character, been convicted of offenses he has committed and put on the chain-gang for quite a while, still, the defendant says and contends, that ought not to condemn him in this case, but that this case ought to be tried according to law and the fact that he has been on the chain-gang for other offenses ought not to prejudice your minds against him, and that you ought not to consider that; and the court charges you you ought not to consider that, except as affecting the credibility of his evidence when he was on the stand as to his statement as to where he was when it occurred, if it does affect his credibility."

The prisoner excepted to the clause, "The defendant says and contends that while he has been a man of bad character, convicted of offenses he has committed." This detached expression is one of several contentions which his Honor recited in summing up the evidence. Testifying in his own behalf, the prisoner said that for various offenses he had spent several years in prison, and the statement of the contention was merely preliminary to the positive instruction that the circumstances referred to were to be considered only as they should tend to affect his credibility. If the trial judge happens to misstate a contention, justice demands and the authorities require that he be given an opportunity to make the correction during the trial. *Walker v. Burt,* 182 N. C., 325; *Jordan v. Motor Lines, ibid.,* 559; *S. v. Reagan,* 185 N. C., 710; *S. v. Ashburn,* 187 N. C., 717. The principle applies also to the judge's statement of an admission. In *La Roque v. Kennedy,* 156 N. C., 360, the Court said: "We must assume that the judge correctly stated the admission of the parties, and if by inadvertence he did not, it ought to have been called to his attention at the time, and cannot be made the subject of exception for the first time in the case on appeal." *Hardy v. Mitchell,* 161 N. C., 351.

In his brief the prisoner sets out this excerpt from the charge to the jury: "And, then, there was a man by the name of Suggs. He stated that on that same night, I believe, he was robbed, the night of the killing, and that he was robbed by this defendant, Johnson. He tells you what time of night it was; that he went down to the jail the next day and recognized Johnson as being the man who robbed him." The record contains no exception to this language. No objection was heard at the time; no exception was taken afterwards; no assignment of error sets it out. A careful perusal of the charge will show that it was one of a series of contentions given on behalf of the State. It is not said in the brief that a witness by the name of Suggs was not examined; only that the record does not disclose that any witness testified to these facts. It is apparent, however, that there was testimony to this effect, for not only did his Honor recite the fact, but submitted a minute recital of the circumstances, and then explicitly restricted the jury's consideration of the testimony to the question of the prisoner's whereabouts at the time of the homicide. The clause objected to seems to have been treated at the trial as of no special significance, calling for no exception in the stenographer's notes or in the statement of the case on appeal.

Several of the exceptions entered at the trial were not brought forward in the prisoner's brief, and are therefore taken as abandoned. Rule 28; *S. v. Bryson,* 173 N. C., 803. We have considered them, nevertheless, and are satisfied that they point out no substantial error. The experienced and learned judge who presided at the trial was careful to safeguard the rights of the prisoner, and to give him the benefit of every doubtful circumstance and of every legal principle to which he was entitled. The controversy turned almost entirely upon the question of identity—whether the prisoner took the life of the deceased, as the State contended, without justification or provocation, or whether, as he contended, he was at home with his family when the homicide occurred. The jury resolved the conflicting testimony against the prisoner, and we have found in the record no sufficient cause for disturbing the verdict of the jury or the judgment of the court.

No error.

IVEY v. BLYTHE ET AL.

(Filed 11 May, 1927.)

Deeds and Conveyances—Restrictions—Reference to Former Deeds—Description—Identification.

Where a development company has divided lands into lots, platted the same, etc., and conveyed the lots to different purchasers by deeds not uniform in their restrictions as to the character and costs of dwellings to be thereon erected, and not evidencing a general scheme of development in this respect: *Held*, one of these lots with such restrictions conveyed to the original owner and sold by it without restrictions of this character, may be conveyed by it to another purchaser freed therefrom, and a mere reference in the conveyance to the former deed containing the restrictive clause is insufficient to incorporate the restrictions of the deed referred to, the reference evidently being for the purpose of identifying the lands.

CIVIL ACTION, before *Finley, J.*, upon an agreed statement of facts, submitted at March Term, 1927, of MECKLENBURG.

The defendants entered into a written contract with the plaintiff to purchase lot No. 10 of Square 5 of Piedmont Park in the city of Charlotte. On 5 May, 1900, Abbott, Stephens and Coleman conveyed, without restriction, a certain tract of land containing 86 acres, lying and being near the city of Charlotte, to a corporation known as the Piedmont Realty Company. The land was subdivided into convenient lots, and these lots were sold to various purchasers. On 20 October, 1900, the Piedmont Realty Company conveyed to F. C. Abbott certain lots, including the lot in controversy. The deed from the Piedmont Realty Company to said Abbott contained the following restriction: "It being further understood and agreed that the lots fronting on Central Avenue and Seventh Street are to be used for residential property only, and that no house costing less than $1,500 shall be erected on Central Avenue, and no house costing less than $1,000 shall be erected on Seventh Street." The lot in controversy fronts on Central Avenue.

On 18 November, 1905, Abbott reconveyed the lot in controversy, without restriction, to the Piedmont Realty Company. After describing the land, the deed contained this clause: "Being the same lot No. 10, Square 5, conveyed by the Piedmont Realty Company to F. C. Abbott by deed, and recorded in the office of the register of deeds for Mecklenburg County, in Book 150, p. 237."

Thereafter, on 6 March, 1908, the Piedmont Realty Company conveyed the lot in controversy to the plaintiff, without restriction, but the following clause appears in the deed of plaintiff: "Being the same lot No. 10, Square 5, conveyed by the Piedmont Realty Company to F. C. Abbott by deed recorded in the office of the register of deeds for Mecklenburg County, in Book 150, p. 237." It appears further that the Piedmont Realty Company executed 58 original conveyances and 14 secondary conveyances. Fifty-seven of the original conveyances conveyed 129½ lots. The remaining original deed conveyed 136½ lots. Of the said 129½ lots, the Piedmont Realty Company conveyed 121½ lots subject to certain restrictions, and seven of said 129½ lots were conveyed without restriction. The 136½ lots left were conveyed to F. C. Abbott without restriction.

The plaintiff, in pursuance of the contract of sale between him and the defendants, tendered deed for said lot No. 10, Square 5, but the defendants refused to accept the deed upon the ground that the plaintiff could not convey a title free of restrictions.

The following judgment was rendered: "This cause coming on to be heard at this term of the court, and it appearing to the court upon the facts agreed that the title to lot 10, Square 5, on the map of the Piedmont Realty Company, being the *locus in quo* set out in said facts agreed, is vested in the plaintiff, free from restrictions, conditions and limitations, and that the plaintiff's deed conveys the said lot free from said restrictions.

"It is thereupon ordered, adjudged, and decreed by the court that the defendant accept the deed tendered therefor, and that the plaintiff recover of the defendants the purchase price to be paid and discharged according to the contract between the parties, and the defendants to pay the cost of this action, to be taxed by the clerk."

From the foregoing judgment the defendants appeal.

Pharr, Bell & Pharr for plaintiff.
C. A. Cochran and F. A. McCleneghan for defendants.

BROGDEN, J. In *Davis v. Robinson,* 189 N. C., 589, this Court held, upon the facts presented in that case, that Piedmont Park was not the result of a general plan or scheme of development of an exclusive residential community. *Justice Varser,* delivering the opinion of the Court, said: "Land is becoming more and more an object of daily commerce, and its uses are changing with the varying needs and wants of society. Invention and new wants reflect themselves in the uses of land, and it is for the best interest of the public that the free and unrestricted use shall be enjoyed, unless such use is restricted in a reasonable manner, consistent with the public welfare. The construction of deeds containing such restrictions or prohibitions as to the uses of lands by the grantees, in the case of doubt, as a general rule, ought to be strict and in favor of a free use of such property, and not to extend such restrictions."

In the case at bar, the plaintiff holds a deed for the lot in controversy, which contains no restrictions whatever, but the defendants contend that the clause in plaintiff's deed from Piedmont Realty Company, "being the same lot No. 10, Square 5, conveyed by the Piedmont Realty Company to F. C. Abbott, by deed recorded in the office of the register of deeds for Mecklenburg County, in Book 150, p. 237," was intended to subject plaintiff's land to the restrictions contained in the original deed from the Piedmont Realty Company to Abbott, bearing date of 20 October, 1900. We do not think that this clause can be enlarged so as to create a restriction. Apparently the clause is a mere reference to a former conveyance for the sole purpose of aiding the identification of the land. A restriction of the free enjoyment and use of property should be created in plain and express terms; and, while perhaps it may be possible, by implication, to create restriction and encumber the free and untrammeled flow of property from purchaser to purchaser, such implication ought to appear plainly and unmistakably.

We are of the opinion that this case is governed by the decision in *Davis v. Robinson, supra,* and the judgment is

Affirmed.

J. T. HOLTON ET AL., TRUSTEES OF RURAL TRINITY METHODIST CHURCH, SOUTH, v. D. E. ELLIOTT.

(Filed 11 May, 1927.)

1. **Wills—Devise—Charitable Uses—Trusts.**

A devise of farm lands to the trustees of a religious congregation to be used as a pastor's home, with provision for the perpetual care of the testator's grave, is a good devise for a charitable use and enforceable to effectuate the testator's intent.

2. **Same—Courts—Jurisdiction—Equity—Conversion — Deeds and Conveyances.**

Where a devise of lands to the trustees of a religious congregation under changed conditions has become ineffectual to carry out the purpose of the testator in providing a home for its pastor, or to carry out the condition annexed thereto, our courts have equitable jurisdiction to order a sale of the lands and the reinvestment of the proceeds in a home suitable for the purpose, and the reinvestment of the remainder of the proceeds of the sale to perform the conditions upon which the home was devised and accepted.

APPEAL by defendant from *Finley, J.,* at March Term, 1927, of MECKLENBURG.

Controversy without action on facts agreed. On 17 October, 1914, Mrs. Harriet T. Neisler made her will, one item of which is as follows: "And my Martin farm I will to be kept in the hands of the trustees of Trinity Church, which are T. M. Carr, J. W. Carr, and others, and their successors in office, for a home for the minister who serves this church, and to keep our lot in the cemetery in nice condition all the time." In May, 1920, the will was duly probated, filed, and recorded in the office of the clerk of the Superior Court. The farm consists of 76.31 acres, situated in Long Creek Township, about seven miles from Charlotte, 68.50 acres being on the east side and 7.81 acres on the west side of

Beattie's Ford road. Upon said farm there is no house or building fit or suitable for use as a home for the minister serving Trinity Church; the only improvement upon said farm is a small tenant house, which is in a bad state of repair, and is hardly habitable in its present condition. The barn, crib, and other out-houses have so fallen into decay as to be unfit for any use for which they were originally intended; on account of the condition and disrepair of said premises, it is impossible to secure a tenant to cultivate said farm, and the income therefrom, being less than $100, is not sufficient to pay a reasonable charge for the oversight and care of said premises. As the property now stands, it is of no practical purpose and use as a home or parsonage for the minister of Trinity Church, but on the contrary is rather a burden than a benefit to Trinity Church; the trustees have no funds with which to build a home or parsonage for the minister serving said church.

The plaintiffs, who are the present trustees of Trinity Church, pursuant to authority given them by the Quarterly Conference, entered into a contract with the defendant in February, 1921, by the terms of which he was to purchase the property at the price of $7,530. Of this sum, not exceeding $5,600 is to be invested in the purchase of a parsonage or home for the minister serving the church, and the remainder to be invested in approved securities, the income from which shall be expended annually in the preservation of the cemetery lot and the upkeep of the parsonage.

Before the commencement of the action the plaintiffs tendered to the defendant a deed in due form, and the defendant refused to accept the deed and pay the purchase price for the alleged reason that the plaintiffs cannot convey a title in fee.

Upon the agreed facts, his Honor adjudged that the plaintiffs are entitled to the specific performance of the contract. The defendant excepted, and appealed.

Pharr, Bell & Pharr for plaintiff.
Stancill & Davis for defendant.

ADAMS, J. In devising the Martin farm to the trustees of Trinity Church, Mrs. Neisler had in mind the double purpose of providing a home for the ministers who should serve the church and of caring for her lot in the cemetery, and keeping it in good condition. These two purposes constituted the chief object of her bounty, and her gift was the means by which the object was to be attained. The devise was a gift for a charitable purpose. Gifts of this character, though not expressly included among those enumerated in 43 Elizabeth, the Statute of Charitable Uses, are upheld and enforced; and courts of equity have jurisdiction to order, and in proper cases do order, the alienation of property devised for charitable uses. *Keith v. Scales,* 124 N. C., 497; *Vidal v. Girard,* 43 U. S., 127; 2 How., 127; 11 Law Ed., 205; 11 C. J., 323; Eaton on Eq., 349. The power is not infrequently exercised where conditions change and circumstances arise which make the alienation of the property, in whole or in part, necessary or beneficial to the administration of the charity. The principle is very clearly upheld in *Church v. Ange,* 161 N. C., 315, in which it is said: "The language, the property 'shall not be disposed of, sold, or used in any other way or for other purpose than the one designated in this clause of my will,' manifests an intention to effectuate the trust, and to permit a sale if the purpose declared, of providing a rectory, can be thereby promoted; but if this power to sell and reinvest in other land, suitable for a rectory, is not contemplated by the will, it is not forbidden, and under the statute, Revisal, sec. 2673, the plaintiffs can sell. If, however, this was doubtful, the sale in this case has the sanction of the Court, and courts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale. *Lockland v. Walker,* 52 N. W. (Mo.), 427; *Brown v. Baptist Society,* 9 R. I., 184; *Stanly v. Colt,* 72 U. S., 119; *Jones v. Habersham,* 107 U. S., 183. In the last case, the Court said of an express provision against alienation: 'It will not prevent a court of chancery from permitting, in case of necessity arising from unforeseen change of circumstances, the sale of the land and the application of the proceeds to the purposes of the trust. Tudor on Charitable Trusts (2 ed.), 298; *Stanly v. Colt,* 5 Wall, 119, 169.' "

The judgment is
Affirmed.

FOREST CITY BUILDING AND LOAN ASSOCIATION v. W. J. DAVIS AND MASSACHUSETTS BONDING AND INSURANCE COMPANY.

(Filed 11 May, 1927.)

1. **Judgments—Principal and Surety—Appeal and Error.**

   The surety on a bond has the right to judgment against the principal thereon as the one primarily liable, and a judgment against him alone in plaintiff's favor is erroneous.

2. **Appeal and Error—Rehearing—Judgments—Principal and Surety.**

   Where it is made to appear that the surety on a bond has not been given a judgment against its principal, and it is necessary for the protection of its legal rights, and upon his exception duly entered the Supreme Court on appeal has inadvertently omitted to pass on this exception, his petition to rehear upon this point will be granted and the proper relief afforded.

PETITION of Massachusetts Bonding and Insurance Company to rehear the appeal in the above-entitled action. Petition allowed.

Flowers & Boyd for petitioner.

CONNOR, J. The above-entitled action was tried at October Special Term, 1925, of the Superior Court of Rutherford County.

From judgment rendered upon the verdict, both defendants appealed to the Supreme Court. This appeal was heard at Spring Term, 1926. Defendants' assignments of error were not sustained. The judgment recovered by plaintiff against both defendants was affirmed. 192 N. C., 108.

Petitioner, Massachusetts Bonding and Insurance Company, now contends that this Court failed to consider and pass upon the assignment of error based upon defendants' exception to the judgment. It contends that there was error in the form of the judgment, in that it does not appear therein that judgment was rendered against it as surety for its codefendant, W. J. Davis. It appears from the petition to rehear that the petitioner has paid the judgment rendered against it. It now asks that the judgment be modified to the end that it may have judgment against defendant W. J. Davis, principal, for the amount so paid.

Whether, upon the record, such modification is necessary, in order that petitioner may have the relief to which it is entitled as surety need not be discussed. Petitioner is clearly entitled to judgment against its codefendant, W. J. Davis, as principal for the amount which plaintiff has recovered against it as surety on his bond. It is ordered that the judgment be modified in accordance with the prayer of petitioner.

The judgment, as thus modified, is affirmed.

Petition allowed.

GEORGE E. BISANAR v. P. J. SUTTLEMYRE.

(Filed 11 May, 1927.)

1. Judgments—Terms—Rendered Outside of Trial County—Consent—Agreement of Parties—Substantial Changes.

Where the parties to an action have agreed that the trial judge may consider the case and sign judgment beyond the limits of the county wherein the case was tried, and he has requested each of them to forward a judgment in accordance with intimations he has expressed, his signing of a judgment sent him by one of the parties is final and he may not, after forwarding it to the clerk of the court, make substantial corrections differing therefrom without the consent of all the parties litigant.

2. Same—Motions—Rights and Remedies—Appeal and Error—Remand.

Where by consent of the parties the trial judge has signed a final judgment out of term, and in another county from the place of trial, it is thereafter open to the party thereto objecting by a motion in the cause or other appropriate remedy to protect any legal rights that he may have.

APPEALS by plaintiff and defendant from *Walter Siler, Emergency Judge,* at December Term, 1926, of CATAWBA.

Civil action for trespass, and to remove obstruction from an alleyway.

The case was referred to Hon. S. J. Ervin under the statute. Upon the coming in of the referee's report, exceptions were duly filed thereto, and heard before his Honor, Walter Siler, emergency judge, at the regular December Term, 1926, of Catawba Superior Court. Near the end of the term the judge announced from the bench the conclusions he had reached on the several matters debated, and gave intimation in a general way of the character of judgment he would render. It was thereupon agreed that the judgment might be signed out of term and out of the district. The court requested counsel for both plaintiff and defendant to draw judgment and forward same to him at his home in Pittsboro, N. C. On 20 December, 1926, counsel for defendant sent to the judge a judgment, which they understood to be in keeping with his intimations, but stated that opposing counsel had not consented to it. This judgment was signed on 23 December, 1926, promptly returned and docketed.

Thereafter, on 15 January, 1927, on application of plaintiff and without notice to the defendant, Judge Siler signed an order at his home in Pittsboro, rescinding said judgment, and on 3 February, 1927, at Raleigh, N. C., after notice to the defendant, and over his objection, the judge signed what is termed a final judgment in the cause, from which both sides appeal, assigning errors.

Thomas P. Pruitt, William L. Marshall, and Walter C. Feimster for plaintiff.

E. B. Cline and Self & Bagby for defendant.

STACY, C. J., after stating the case: It is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court, even in his own district, has no authority to hear a cause, or to make an order substantially affecting the rights of the parties, outside of the county in which the action is pending. *Gaster v. Thomas,* 188 N. C., 346; *Cahoon v. Brinkley,* 176 N. C., 5; *Mann v. Mann, ibid.,* 353; *Cox v. Borden,* 167 N. C., 320; *Bank v. Peregoy,* 147 N. C., 293; *Godwin v. Monds,* 101 N. C., 354; *McNeill v. Hodges,* 99 N. C., 248; *Moore v. Hinnant,* 90 N. C., 163. See, also, *Thomas v. Watkins, ante,* 630.

Mr. Freeman, in his valuable work on Judgments, Vol. 1 (5 ed.), 269, speaking to the subject of correcting judgments after term, says:

"As a general rule, unless control over it has been retained in some proper manner, or a statute otherwise provides, no final judgment can be amended after the term at which it was rendered or after it otherwise becomes a final judgment. The power of courts to correct clerical errors and misprisions and to make the record speak the truth by *nunc pro tunc* amendments after the term does not enable them to change their judgments in substance or in any material respect. And this is true even though the judgment has not been formally entered of record by the clerk, where such entry is not essential to its validity. Consequently, it is well settled that, in the absence of statute permitting it, the law does not authorize the correction of judicial errors, however flagrant and glaring they may be, under the pretense of correcting clerical errors. To entitle a party to an order amending a judgment, order, or decree, ordinarily, he must establish that the entry as made does not conform to what the court ordered."

In the case at bar, by consent of the parties, the judge was authorized to sign judgment out of term and out of the district. This ended, we think, when he signed the judgment, tendered by the defendant, on 23 December, 1926. His subsequent orders, therefore, were without warrant of law. *Dunn v. Taylor,* 187 N. C., 385. The defendant's exceptions to these must be sustained, but this will be done without prejudice to the rights of the plaintiff to question the judgment signed on 23 December, 1926, by motion in the cause, or other appropriate remedy. To this end the cause will be remanded for such further proceedings as the rights of the parties may require.

On defendant's appeal, Error.

On plaintiff's appeal, Remanded.

STATE v. GLEN HOLLAND.

(Filed 11 May, 1927.)

1. **Homicide—Murder—Self-Defense—Evidence—Questions for Jury.**

A homicide is justifiable when the killing is done under a reasonable apprehension under the circumstances that it was necessary to prevent the killing of the accused, or to save himself from great bodily harm, and the question of the reasonableness of such apprehension under the circumstances is one for the jury.

2. Same—Evidence—Questions for Jury.

Upon the question of justifiable homicide, evidence is permissible that tends to show that the defendant was physically greatly inferior to the deceased, knew of his dangerous character or reputation, and of threats made by him against his life, had previously been assaulted without provocation by the deceased, and that at the time of the killing he had retreated before him in fear as he advanced upon him until prevented by his surroundings.

3. Homicide—Evidence — Self-Defense — Collective Facts — Appeal and Error—Prejudice—Reversible Error.

Where there is evidence tending to show that the accused killed the deceased under a reasonable apprehension of his own death or of receiving great bodily harm from him; that he unexpectedly met the deceased at the door of the room he was leaving, his testimony that he "could tell from the appearance of the deceased, when he came in the cafe door, and jumped at me, that he was mad. I think he was drinking," is competent as a statement of collective simple facts calling for an ordinary and natural inference, which conclusion in itself is a statement of a fact, and its exclusion by the trial judge constitutes prejudicial and reversible error under the evidence of this case.

APPEAL by defendant from *Harwood, J.*, and a jury, at November Term, 1926, of CATAWBA. New trial.

The defendant was convicted of murder in the second degree and sentenced to be confined in the State's prison for twelve years at hard labor.

The substance of the State's evidence: Defendant, Glen Holland, killed Paul Donkel, 24 October, 1926, about 3 o'clock in the evening, in the Riverside Cafe in the town of Brookford. The cafe had the usual counters, stools, etc. Donkel was killed near the back of the room. He was shot once through the eye. Deceased weighed about 170 pounds, was about 21 years old. When examined a short time after the killing by the sheriff he had in his hip pocket three-fourths of a pint of whiskey. The only means of ingress and egress to the cafe from the public road is the front door. The defendant was in the cafe and had a pet squirrel. He asked Dewey Austin, State's witness, who was in the cafe, to keep the squirrel, and gave him some chestnuts to feed it, as he was going out to take his girl to ride. He started towards the front door, the only way out, in a perfectly good humor. The deceased came in the front door, meeting defendant going out. Defendant commenced backing, with his hand on his right hip pocket. Nothing was seen in deceased's hands. Defendant was backing and deceased walking towards him. Defendant backed and deceased followed him twelve or fifteen feet. Deceased was about six feet from defendant when defendant shot him—got his pistol from his hip pocket and shot deceased one time. Deceased fell and did not move. Defendant got his squirrel off Austin's shoulder and went out the door. Both had been in the cafe that morning about 11 o'clock and at one o'clock, but did not speak to each other. When deceased was walking towards defendant he was taking slow, short steps. Defendant said, "Don't come on me, Paul" (meaning Donkel), and deceased said, "Don't pull no G—d— knife on me." He looked as if he was going to get hold of defendant and he seemed about half mad. Defendant backed up behind the stove in the corner. Defendant looked like he was frightened and scared. When deceased came in the door he lit a cigarette, was smiling and said to some one that he was going to knock "H— out of somebody." Some one said, "No, I would not do that." Defendant said, "Paul, don't come on me." Deceased said, "Don't pull no G—d— knife on me." Defendant kept telling deceased not to come on him, until he got next to the stove; deceased kept walking towards him; then defendant shot. From where Holland shot it was about twenty-five feet to the door. Deceased had a cigarette in his left hand. The only means of escape was going out the front door.

Jesse Smith, for the State, testified in part: "About three months before this shooting occurred I witnessed a difficulty between them—Paul Donkel and Glen Holland. They had a little trouble at the Riverside Cafe on Saturday night. After Paul hit Glen, Glen said: 'You son of a b—, I will get you later.' Paul started walking off, then stopped and said, 'You can get me now if you want to,' and Glen said, 'I will get you later.' This happened out in front of the Riverside Cafe."

When this occurrence took place defendant was assaulted by deceased while sitting in the car talking to Nora Hefner in front of the cafe. This witness admitted (1) he was sentenced to the roads for forgery, (2) accused of breaking in store at Brookford and stealing goods, (3) convicted of fighting two or three times and sent to the roads, (4) been off and on the roads for past two or three years, (5) been accused of selling liquor, "but they never did catch me."

Charlie Nance, an uncle of deceased, testified in part: "He (defendant) said he was not going to whip Paul (deceased), but he was going to shoot h— out of him. This happened the last of September."

Dr. Ford testified that the general reputation of Nance was good.

The defendant testified, in part, that he was 18 years old and weighed about 140 pounds. Knew deceased for ten or twelve years; lived about three miles apart. Was in the cafe about 11 o'clock and about 1 o'clock and saw deceased, but no word was spoken between them. Went to cafe about 3 o'clock, drank a coca-cola, gave pet squirrel to Dewey Austin to keep for him for about half an hour. "I was going to take my girl, Nora Hefner, for a ride when I left the cafe." He described the cafe room and testified as to the occurrence: "I started to go get in my car to take my girl to ride. I got within two or three feet from the door. Donkel came in, and the first I heard him say was, 'G— d— you, I am going to kill you or knock h— out of you,' or something like that, and then he jumped at me. I began to back. I had gotten within about three or four feet of the door, which was about twenty-five feet from where I had been with the squirrel and the other folks. I did not know Paul Donkel was at the door until he spoke. I began to back away and said, 'Paul, don't come, don't come on me,' three or four times. I backed as far as I could between the counters and back behind the stove, and when I got back there I said again, 'Paul, don't come on me,' and he started to take another step towards me and I shot him one time for the purpose of stopping him. I backed back twenty or twenty-five feet pretty rapidly. I was scared he was going to kill me, and was trying to get out of his way. I was watching him. Paul had his hand right on his hip pocket like that (showing the jury), under his coat, when he began to come on me. I did not observe his left hand. He spoke something to me several times after he jumped from the door to me. I was too scared to notice much of anything. He was coming on me and had me hemmed up in the corner, and I said, 'Paul, don't come on me; I don't want to have any trouble,' and he says, 'Don't you pull no G— d— knife on me.' Where I was I could not step back any further. I believed he was armed. I shot Paul Donkel because I was scared of him and wanted to stop him. I knew he was a dangerous man. I was scared he was going to kill me, and I just had to do it. I shot him for the purpose of stopping him. After I shot him, I left the building. I came back on the following Thursday and gave myself up to the sheriff. I know that Paul Donkel had made threats towards me before 24 October. It was in the city jail one Saturday morning a couple of months before 24 October. G. C. Travis, chief of police of Brookford, was present at the time he made the threat. Brookford is about three miles from Hickory. Paul Donkel was locked up in jail. He walked up to my car one night while I was sitting there talking to my girl, Nora Hefner, and hit me. He nearly beat me up. The next morning I went to the police and had a warrant sworn out. He sent for me while he was in jail and said he wanted to see me. I went back there and he said, 'G— d— you, you son a b—; I have not done no lifetime crime, and I will get out some time, and when I do I am going to kill you.' . . . The next threat that I heard him make against me was one Saturday afternoon. I was standing on my father's porch and he was in front of B. L. Pitts' store. Mr. Pitts is a merchant at Brookford and is here now. Paul said, 'G— d— you, you son of a b—, I am going to kill you.' He was talking to Mr. Pitts about me. I turned around and went into father's store. Since that time a number of threats have been communicated to me that the deceased, Paul Donkel, made against me. . . . Arthur Hefner said Paul said, 'I am going to throw dynamite under the G— d— car and blow me into h—.' . . . Will Krider said Paul said, 'He wished he could lay off from work just about one hour; that he would like to kill that son of a b—.' Paul was working on the yard force with Will Krider. . . . I recall when it was that Paul began to show a decided hatred for me. It was when I had the warrant taken out for him, and I was summoned on a case where I had seen him cut a man—Ern Julian. I had sworn against him for the State. They had me summoned, and after I had the warrant taken out it seemed to me that he always had it in for me ever since then. I did not have anything to do with the warrant in the Ern Julian case. After I was subpœnaed as a witness, he struck me when I was in my car with Nora Hefner. These two cases were tried together at the same time in Hickory, and I was witness for the State. Up to that time I do not know of any feeling he had towards me. On one occasion when I passed riding in my car and passed where he was walking, Paul Donkel threw a rock at me and hit the back of my car—dented in the back of the car where it hit. That was tried in the recorder's court in Hickory. I did not know he was about before the rock hit the car. There were four or five of them together in the road. I got the pistol that I shot Paul Donkel with some four or five months ago. I put it in my pocket the Saturday night before. I had heard that Paul Donkel was in Catawba County. I was not looking for him in the least. I lived about half a mile from the Riverside Cafe."

Q. State whether or not, or did you know the general reputation of the deceased, Paul Donkel, as being a dangerous and violent man? A. Yes, he was dangerous. I was scared of him.

Q. Answer the question whether or not it was good or bad. A. It was bad."

He denied, as did Nora Hefner, that he made any statement as testified to by State's witness, Jesse Smith. He denied that he had any ill feeling towards deceased at the time of the killing. Denied the threat as testified to by Nance, or that he had made any threat against Donkel.

The following answer to a question asked defendant was objected to by the State and motion to strike out allowed by the court below, the answer to which defendant excepted and assigned error, is as follows: *"I could tell from the appearance of the deceased, Paul Donkel, when he came in the cafe door and jumped at me that he was mad. I think he was drinking."*

Numerous witnesses for defendant testified that the general reputation of deceased as a dangerous and violent man was bad, including the chief of police and mayor of Brookford. Defendant testified as to communicated and uncommunicated threats. There was testimony as to the general reputation of defendant by one witness as being bad for drinking and fighting, and by two witnesses bad and pretty bad for fighting, to which defendant excepted and assigned error. From judgment rendered defendant appealed to Supreme Court. The above assignment of error is the only one necessary to be considered.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Wilson Warlick, A. A. Whitener, Whitener & Whitener and C. L. Whitener for defendant.

CLARKSON, J. The first law of nature is that of self-defense. The law of this State and elsewhere recognizes this primary impulse and inherent right. One being without fault, in defense of his person, in the exercise of ordinary firmness has a right to invoke this law and kill his assailant, if he has reasonable ground for believing or apprehending that he is about to suffer death or great or enormous bodily harm at his hands. The danger or necessity may be real or apparent. It is for the jury, and not the party setting up the plea, to determine, under all the facts and circumstances, the reasonableness of the grounds for the belief or apprehension of the real or apparent danger or necessity. The mere fact that a man believes or apprehends that he is in present, immediate and imminent danger of death or great bodily harm, is not sufficient to justify the taking of the life of a human being, but there must be reasonable ground for the belief or apprehension—an honest and well-founded belief or apprehension at the time the homicide is committed. *S. v. Dixon,* 75 N. C., 275; *S. v. Turpin,* 77 N. C., 473; *S. v. Barrett,* 132 N. C., p. 1005; *S. v. Lipscomb,* 134 N. C., p. 689; *S. v. Garland,* 138 N. C., p. 675; *S. v. Lilliston,* 141 N. C., p. 857; *S. v. Blackwell,* 162 N. C., p. 672; *S. v. Thomas,* 184 N. C., p. 757; *S. v. Johnson,* 184 N. C., p. 789; *S. v. Bost,* 192 N. C., p. 1; Horrigan & Thompson, Cases of Self-Defense, p. 968-9.

In *S. v. Hand,* 170 N. C., at p. 706, it is said: "It is well-settled law that when the killing with a deadly weapon has been proven or admitted, the burden is on the prisoner to show excuse or mitigation. *S. v. Gaddy,* 166 N. C., 341; *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ibid.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Brittian,* 89 N. C., 481."

In *S. v. Johnson,* 166 N. C., at p. 395, speaking to the question: "This Court said in *S. v. Gray,* 162 N. C., 612, that 'One may kill when necessary in defense of himself, his family, or his home, and he has the same right when not actually necessary, if he believes it to be so, and he has a reasonable ground for the belief,' and in *S. v. Kimbrell,* 151 N. C., 709, 'If there was *any* evidence to go to the jury in support of this contention, then it was for the *jury,* and not for the *court,* to pass upon the question of his *motive* in firing the shots, as well as the *reasonableness* of the grounds of his apprehension. *S. v. Nash,* 88 N. C., 618; *S. v. Harris,* 119 N. C., 861; *S. v. Hough,* 138 N. C., 663; *S. v. Blevins,* 138 N. C., 668; *S. v. Castle,* 133 N. C., 769; *S. v. Clark,* 134 N. C., 699; *S. v. Barrett,* 132 N. C., 1005.' "

"One cannot be expected to encounter a lion as he would a lamb." *S. v. Floyd,* 51 N. C., 392; *S. v. Williams,* 186 N. C., p. 627.

In *S. v. Turpin,* 77 N. C., at p. 477, it is held: "Where one is drawn into a combat of this nature by the very instinct and constitution of his being, he is obliged to estimate the danger in which he has been placed, and the kind and degree of resistance necessary to his defense. To do this he must consider not only the size and strength of his foe, how he is armed, and his threats, but also his character as a violent and dangerous man. It is sound sense, and we think sound law, that before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed. If the prisoner was ignorant of the character of the deceased, then the proof of it would have been inadmissible, because his action could not have been influenced by the dangerous character of a man of whom he had no knowledge." *S. v. Matthews,* 78 N. C., 523; *S. v. Hensley,* 94 N. C., 1021; *S. v. Rollins,* 113 N. C., 722; *S. v. Byrd,* 121 N. C., 684; *S. v. McIver,* 125 N. C., 645; *S. v. Sumner,* 130 N. C., 718; *S. v. Blackwell, supra.*

In *S. v. Hough,* 138 N. C., at p. 667-8, it is said: "It is true there is no evidence that the deceased was armed with a deadly weapon, at least none was exhibited, but the evidence does show that the deceased had sent word to the defendant that he intended to kill him, and the defendant had a right to suppose that the deceased was endeavoring to carry out his threat and was prepared to do it. Then, again, the evidence shows there was an enormous disparity in the relative strength and power of the defendant and deceased, the one being a weakly, delicate man of very small stature; the other, in comparison, being a giant of violent nature, and evidently capable of either killing the defendant or doing him great bodily harm without the aid of a weapon. The defendant was on his own premises, engaged in his peaceful pursuits at the time the deceased advanced on him in a manner giving unmistakable evidence of his purpose to do the defendant bodily harm."

In *S. v. Barrett,* 132 N. C., at p. 1010, it is said: "There is a marked difference between an actual necessity for killing and that reasonable apprehension of losing life or receiving great bodily harm, which is all that the law requires of the prisoner in order to excuse the killing of his adversary, and it was just this difference that may have caused the jury to decide against the prisoner upon this most important issue in the case." *S. v. Johnson,* 184 N. C., p. 637; *S. v. Bush,* 184 N. C., p. 778.

With these principles of law well settled in this State, we come to the vital assignment of error of defendant.

Defendant objected and assigned error in the court below striking out the following testimony of the defendant: *"I could tell from the appearance of the deceased, Paul Donkel, when he came in the cafe door and jumped at me that he was mad. I think he was drinking."* We think this evidence was competent.

In *S. v. Leak,* 156 N. C., at p. 647, this Court, speaking to the subject, said: "The rule applicable to evidence of this character is clearly and accurately stated in McKelvey on Evidence, p. 220 *et seq.,* as follows: 'The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals and things, derived from observation of a variety of facts presented to the senses at one and the same time are, legally speaking, matters of fact, and are admissible in evidence. A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature. This class of evidence is treated in many of the cases of opinion admitted under the exception to the general rule, and in others as matter of fact—'shorthand statement of fact,' as it is called. It seems more accurate to treat it as fact, as it embraces only those impressions which are practically instantaneous, and require no conscious act of judgment in their formation. The evidence is almost universally admitted, and very properly, as it is helpful to the jury in aiding to a clearer comprehension of the facts.' " *Renn v. R. R.,* 170 N. C., 128; *S. v. Spencer,* 176 N. C., 709.

Mr. Nash, for the State, in his argument with his usual intellectual honesty admits error, but contends it was harmless. We cannot so hold. The deceased, Paul Donkel, cursed defendant, Glen Holland, and told him, while in jail, "I will get out some time, and when I do I am going to kill you." Other threats had been made to defendant, and repeated threats made by deceased against defendant's life had been communicated to him. Defendant had seen deceased cut Ern Julian, and because defendant was subpœnaed as a witness deceased "struck me when I was in my car with Nora Heffner"—"he nearly beat me up." Defendant knew deceased's general reputation was bad as being a dangerous and violent man. The appearance of the deceased, as he came in the cafe, under the facts and circumstances of this case, was all important to the defendant. The reasonableness of the ground for his belief or apprehension of danger to life or great bodily harm was for the jury to pass on, but the defendant had a right to state the action and appearance of the deceased as he came in the cafe door: (1) he jumped at him, (2) he was mad, (3) thought he was drinking. This was competent evidence and the exclusion prejudicial. Defendant was entitled to the impression made on him with the previous known threats and the knowledge of deceased's general reputation as a violent and dangerous man, which would indicate to him that he was not going to encounter a lamb. This aspect he was entitled to have considered by the jury in weighing his conduct with the other evidence as to the reasonableness of the grounds of his belief or apprehension that he was about to suffer death or great bodily harm at the hands of the deceased. The probative force was for the jury.

As the case goes back for a new trial, the other exceptions we do not think necessary to pass on. For the reasons given, there must be a

New trial.

DeLANEY et al. v. VanNESS et al.

(Filed 11 May, 1927.)

1. **Deeds and Conveyances—Restrictions as to Buildings—Land Development Companies.**

   Where a general scheme of development of an area of land into lots platted and sold with reference to streets, etc., laid off therein containing restrictions as to the kind of dwellings to be erected thereon, is not alleged in the complaint in a suit by the owners of some of these lots seeking injunctive relief against other purchasers from erecting a class of residences inhibited in their own deeds, a demurrer to the complaint is good.

2. **Same—"Dwellings"—Apartment Houses.**

   Where the restrictions in a deed in a general scheme of selling an area of land into lots contains a building restriction that the houses shall be "dwellings," the word "dwellings" so used is construed to include apartment houses in which several families dwell, in the absence of other descriptive words that would further restrict the character of the dwellings which may be erected on the lots, as where it is stated not more than one dwelling may be erected.

Civil action, heard upon complaint and demurrer, by *Finley, J.*, at April Term, 1927, of Mecklenburg.

Plaintiff alleges that Ethel R. DeLaney is the owner of lot No. 13, in block No. 13, of the revised map of Piedmont Park, said lot fronting 66 feet on Louise Avenue and having a depth of 150 feet; that Ethel R. DeLaney purchased said lot from Perle Meacham Welch and her husband, C. M. Welch, by deed dated 27 July, 1920; that Welch and wife held title by sundry mesne conveyances from Suburban Realty Company.

The following reservations, conditions and restrictions appear in Ethel DeLaney's deed, to wit: "This conveyance is upon condition that no owner of said real estate shall at any time hereafter erect upon said real estate any structure except a dwelling-house which shall cost not less than fifteen hundred dollars ($1,500), and no owner of said real estate shall permit any building erected thereon to be used for other purpose than dwelling and other necessary outhouses," etc.

The plaintiff further alleged that the Piedmont Realty Company conveyed 136½ lots in Piedmont Park to F. C. Abbott, by deed dated 29 January, 1906, which said deed contained no restrictions; that on 1 February, 1906, Abbott conveyed said 136½ lots to the Suburban Realty Company by deed containing no restrictions. It was further alleged that plaintiffs, Thomas B. Goode and wife, Bess W. Goode, are the owners of parts of lots Nos. 1 and 2, in block 14, said land beginning 50 feet from the intersection of East 7th Street and Park Drive, and that Goode and wife are the owners of said lot by virtue of a deed dated 12 August, 1922, and executed by John R. Pharr, and mesne conveyances from Piedmont Realty Company to Joseph Ruth. The Goode deed contains the same restrictions and conditions recited in the DeLaney deed above mentioned.

It is further alleged that the defendants, John R. VanNess and Chase Brenizer, are the owners of and tenants in common of lot No. 1, block 13, of the property known as Piedmont Park, and that said defendants are also the owners of lot No. 2, in block No. 13, of said Piedmont Park property. The defendants acquired title through mesne conveyances from Piedmont Realty Company to J. Louis Spencer and wife, J. C. Neal and wife, and Dixie Realty and Building Company; that the deed of the defendants contains the same conditions and restrictions as those set out in the plaintiff's deed. It is further alleged in the complaint "that Piedmont Park was originally an 86-acre tract of land, purchased by F. C. Abbott in 1900. A corporation, Piedmont Realty

Company, was formed, and the land conveyed to it and then developed into lots, streets and avenues, and the map showing lots, blocks, streets, avenues and alleys was made and spread upon the records in the office of the register of deeds of Mecklenburg County; that the Piedmont Realty Company, pursuant to said map, made 58 original conveyances of lots in Piedmont Park and 14 secondary conveyances, the latter consisting of quit-claims, corrective deeds, releases and reconveyances upon title being reinvested in said company; that 57 of said original deeds conveyed 129½ of said lots, the remaining one original deed conveying 136½ lots as hereinafter set forth; that the Piedmont Realty Company conveyed 121½ lots subject to a restriction same as appears in plaintiff's deed; that 8 of said 129½ lots were conveyed without any restriction to residential purposes only; that of the 57 original conveyances 54 contained the restriction hereinbefore mentioned, 3 deeds containing no restriction whatsoever; that on 29 January, 1906, the Piedmont Realty Company made an original conveyance of 136½ lots as aforesaid to F. C. Abbott, which deed contained no restrictions whatsoever; that said deed was the 53rd conveyance of the Piedmont Realty Company, prior thereto 117½ lots having been conveyed subject to the restrictions set forth, and 6 unrestricted; that the said F. C. Abbott, prior to said conveyance, caused to be organized a corporation known as the Suburban Realty Company, with himself as president; that said conveyance of 136½ lots by Piedmont Realty Company to F. C. Abbott was made 29 January, 1906. . . . The said F. C. Abbott conveyed the identical property to the suburban Realty Company by deed which contained no restrictions. . . . The total number conveyed by Piedmont Realty Company with restrictions was 121, without restrictions 134½. The Suburban Realty Company made maps of its purchase and other added blocks and spread same on record. . . . The Suburban Realty Company conveyed said 136½ lots and 40 other lots added by it thereto from other contiguous lands, referring to its map and subject to restrictions, practically the same as those contained in the Piedmont Realty Company deeds. Before the Piedmont Realty Company conveyed the said land to Joseph Ruth and wife, Jennie Ruth, under whom said Thomas B. Goode and wife, Bess W. Goode, plaintiffs, claim, said Piedmont Realty Company had conveyed to sundry purchasers 60½ lots by 42 deeds with restrictions, and 6 lots by 4 deeds without restrictions, and before said Piedmont Realty Company conveyed the said land to J. Louis Spencer and wife, under whom defendants claim, said company had conveyed to sundry purchasers 55½ lots by 41 deeds with restrictions and 6 lots by 4 deeds without any restrictions. . . . That the Piedmont Realty Company has not done any business or owned any land in the Piedmont Park or elsewhere since 19 June, 1911, and on 19 June, 1911, said corporation was dissolved so that it cannot join in this action or bring an action in behalf of plaintiffs and others against said defendants; that there are now in said Piedmont Park only three houses which are other than what is known as a single-family house, two of said houses being four-family apartments, and one being a duplex or two-family house, and in addition thereto one filling station, one four-family apartment, the duplex house and filling station being on 7th Street, and one four-family apartment on Beaumont Avenue.

That while the plaintiffs, Ethel R. DeLaney and Thomas B. Goode and wife, Bess W. Goode, and those under whom they claim their said lots of land, have not heretofore brought an action for an injunction or other legal action against any of the owners of said four-family apartments, or said duplex house, and have made no formal protest against their erection or maintenance, they have not expressly given their consent to the erection or maintenance thereof.

That the said defendants have had plans drawn and made for the erection of two apartment houses, one an eight-family apartment house on the front part of said land owned by them and herein described, fronting on 7th Street, and a four-family apartment house on the rear part of said land fronting on Beaumont Avenue, and they propose to build such apartment upon said lands.

The plaintiffs alleged that the building of said apartment houses on said lands by said defendants will irreparably injure the said plaintiffs and the value of the land owned by them.

That the plaintiffs bring this action on behalf of themselves and all other parties owning lots in Piedmont Park in the city of Charlotte who may come in and be made parties plaintiff.

Wherefore, plaintiffs pray judgment that defendants be perpetually restrained and enjoined from erecting upon their land herein specifically described any apartment house or any other house except what is known as a one-family dwelling house, from dividing their said lot into two parts, one fronting on East 7th Street and the other fronting on Beaumont Avenue, and from using said lots or either of them for the purpose of building said apartment houses or houses other than one-family dwelling-houses, and plaintiffs further pray judgment for the costs of this action to be taxed by the clerk, and for such other and further relief to which they may be entitled."

The defendants demurred to the complaint, said demurrer being as follows:

"The defendants demur to the complaint of the plaintiffs and assign as grounds therefor that the complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint:

"1. That there was no general scheme or plan to impose restrictions upon Piedmont Park, and especially was there no general scheme or plan to prevent the building of apartment houses.

"2. That the facts alleged negative any general purpose to restrict the lots in Piedmont Park, and that unrestricted lots were so scattered as to evince a lack of any general plan to restrict all the lots in their use.

"3. That a large number of lots was conveyed by the Piedmont Realty Company by primary conveyances without restrictions, and that they were registered prior to the sale of either of lots of plaintiffs or defendants. Two lots had been released from the restrictions in order that a grocery store might be erected and maintained. 144½ lots were conveyed without restrictions. Several lots were conveyed by deeds containing restrictions that were not uniform with those under which plaintiffs and defendants claim. No covenants appear in any deeds from the Piedmont Realty Company or the Suburban Realty Company registered prior to the deeds made by the Piedmont Realty Company under which the plaintiffs or defendants claim that like restrictive covenants would be inserted in all other deeds made by either of these companies; that the Piedmont Realty Company's deeds which contained the restrictions also contained a provision that 'the party of the first part did reserve to itself all of the rights and easements not herein expressly granted.' This provision is notice that all rights and easements not expressly granted in each particular deed were held by the Piedmont Realty Company and would not pass to other subsequent purchasers by implication; the grantor reserved to itself the free and unrestricted use and right of alienation of its unsold property. There is no covenant in the plaintiffs' deeds that all other conveyances will contain similar restrictive covenants.

"4. That the language of the restrictions contained in the deeds under which the plaintiffs and defendants claim does not prevent the erection of an apartment house.

"5. That some of the deeds containing restrictions use the language 'no owner of said real estate shall at any time hereafter erect upon said real estate any structure except a dwelling-house'; another, 'The lots fronting on Central Avenue and 7th Street are to be used for residence lots,' expressing no, and therefore excluding any, restriction upon the three lots on Sunnyside and Louise avenues; another, 'the first building erected on said lots shall be a dwelling-house,' expressing no, and therefore excluding any, restriction upon the other lots; another, 'The lots herein conveyed are to be used for residence purposes only.'

"6. That there are already two apartment houses, one duplex house and a filling station in 'Piedmont Park,' on account of which no action has been brought, and against which no formal complaint appears to have been made, and plaintiffs appear to have abandoned and are estopped to claim any rights to any restrictions, if there be such restrictions, against apartment houses, or to prevent defendants from erecting or maintaining apartment houses.

"7. That there is no restriction in any of the deeds preventing the division or redivision of said lots."

The judgment of the court was as follows: "This cause coming on to be heard before the undersigned, by consent of plaintiffs and defendants, and it appearing to the court that the plaintiffs have filed their duly verified complaint, and defendants having filed their demurrer thereto, and it appearing upon consideration of such complaint and demurrer that the facts stated in the complaint do not constitute a cause of action against the defendants, it is ordered and adjudged that the said demurrer of defendants be and the same is hereby sustained."

From the foregoing judgment sustaining the demurrer the plaintiffs appealed.

John Paul Trotter for plaintiffs.
Brenizer & Scholl for defendants.

BROGDEN, J. The plaintiff does not expressly allege in the complaint that Piedmont Park was the result of a general plan or scheme of residential development. But conceding that the complaint, when liberally construed, amounts to such allegation, yet the history of conveyances of the property would indicate that there was no such general plan or scheme as the law contemplates. Indeed, upon facts similar to the facts of the present record, this Court held in *Davis v. Robinson,* 189 N. C., 589, that Piedmont Park was not the result of a general and uniform plan, scheme or design. Upon the facts alleged in the complaint and admitted by the demurrer the question as to the general plan or scheme is a question of law rather than of fact. But if it be granted that Piedmont Park, upon the facts as presented in the record, is the result of a general plan or scheme for residential development, the question arises as to whether or not the restriction contained in the deeds of both plaintiffs and defendants prevents the erection of an apartment house by the defendants. The language of the restriction pertinent to the point involved in the case is as follows: "This conveyance is made upon condition that no owner of said real estate shall at any time hereafter erect upon said real estate any structure except a dwelling-house. . . . And no owner of said real estate shall permit any building erected thereon to be used for other purposes than dwelling and necessary outhouses."

The real question therefore is, whether or not this language excludes the erection of an apartment house.

The governing words in the restrictive covenant are "a dwelling-house." "A dwelling-house is a house occupied as a residence, in distinction from a store, office, or other building." *Johnson v. Jones,* 90 Atl., 649. In that case the restrictive covenant was in this language: "That nothing but a church or a dwelling-house, together with the outbuildings necessary for the convenience and comfort of the occupants thereof shall ever be erected upon any part of the said land," etc. A suit was brought to restrain the erection of apartment houses upon the land subject to said restriction. The Court said: "Not only does the proposed structure fall within the meaning of the term dwelling-house, as it is here implied, but in addition it may be said that, having regard to the purpose and object of the covenant as expressed in the agreement it in no way intervenes, at least so far as here appears." In *Satterthwait v. Gibbs,* 135 Atl., 862, the Supreme Court of Pennsylvania, in a decision rendered 24 January, 1927, said: "It has been uniformly held that an apartment house is not a hotel, but is a building used as a dwelling for several families, each living separate and apart." In *Underwood v. Herman,* 82 N. J. Equity, 358; 89 Atl., 21, the Court held that a two-family apartment house did not violate a restriction contained in a deed to the effect that no building other than a dwelling-house and its appropriate buildings should be erected upon the land. The New York Court of Appeals, in the case of *Reformed Dutch Church v. Madison Avenue Building Co.,* 214 N. Y., 268; 108 N. E., 444; L. R. A., 1915 F, 651, considered the question as to whether an apartment house was a dwelling-house within the meaning of a restriction providing in substance that no owner of a lot should erect thereon any building or erection other than brick or stone dwelling-houses of at least two stories in height, etc. The Court said: "The precise question is whether an apartment house will be a 'dwelling-house' within the meaning of this provision, for there is no objection to the form, style, character, or construction of the proposed building other than that it is to be an apartment house accommodating many families, instead of a dwelling-house intended for occupation by a single family.

"It seems very clear that the simple term 'dwelling-house' used in this covenant is broad enough to include and permit an apartment house. We require little aid from dictionaries or decisions to enable us to see that, within the ordinary meaning of language, a 'dwelling-house' is a house or structure in which people dwell, and such, concededly, are the character and purpose of an apartment house. There is no way in which we can fairly engraft upon these particular words, considered by themselves, any further limitations of definition which would make a structure used for ordinary dwelling purposes more or less a dwelling-house merely because of the number of people who dwelt in it. I think that the appellant really concedes this, but it urges upon us that the words 'dwelling-house' in this particular case are to be interpreted as though they were 'private dwelling-house,' thereby meaning a building designed for occupation by one family only, and in which case the term doubtless could exclude an apartment house. . . . In conclusion, it may be stated that there is no lack of appreciation of the sentiments of those residents of this district who have become attached to it as one of a private residential character, and who are anxious to preserve it against the inroads of more public or business purposes. There must, however, be considered the rights of those who desire or feel compelled to devote their property to such latter uses, and who have an absolute right to invoke the principle that they may thus do, unless such right has been clearly restricted by some binding covenant or limitation, and this, as we have held, does not exist against the present proposed use of the respondent's lot." The authorities bearing upon the subject are referred to in 27 R. C. L., secs. 524, 525; *Bolin v. Investment Co.,* L. R. A., 1918 C, 869; *Hunt v. Held,* 90 Ohio St., 280; 107 N. E., 765; Ann. Cas., 1915 A, 419.

The plaintiffs rely upon the case of *Bailey v. Jackson,* 191 N. C., 61. In that case, *Adams, J.,* speaking for the Court, said: "By a critical examination of the record and the authorities we are satisfied that an apartment house is not a residence in contemplation of the several restrictive covenants set out in the various deeds." The restrictive clause pertinent to the point in controversy was as follows: "Will not build more than one residence on either lot of said land." The fundamental difference between the restriction in the *Bailey case* and the restriction in the instant case is obvious. One residence on each of said lots is essentially a more contracted term than the expression, "a dwelling-house." We are of the opinion, and so hold, that the erection of an apartment house upon the land in controversy, as proposed by defendants, is not prohibited by the restrictive covenants in the deeds under which the parties hold title.

The Supreme Court of Pennsylvania, in the *Satterthwait case, supra,* has well said: "Covenants restricting the use of land are construed more strictly against the one claiming their benefit and in favor of free and unrestrained use of property; violation of covenant occurs only when there is a plain disregard of the limitation imposed by its express words."

The judgment is
Affirmed.

THE STATE ON THE RELATION OF THE BOARD OF COMMISSIONERS OF JOHNSTON COUNTY v. W. T. ADAMS, J. A. KEEN, THE FIDELITY AND DEPOSIT COMPANY AND THE MARYLAND CASUALTY COMPANY.

(Filed 11 May, 1927.)

1. **Officers—Counties—Register of Deeds—Principal and Surety—Defalcation—Terms of Office—Application of Payment.**

Where the register of deeds succeeds himself in office, and has given a bond indemnifying the county against loss for each of these terms with different sureties, and has defaulted in the payment of fees he has collected for the county during each term of office, the respective surety companies are liable only to the extent of the defalcation covered by the term in which it occurred, and without the consent or knowledge of the surety for the second term, the principal has no power to direct *pro tanto* the application of a payment he has made, collected during his second term of office, on the amount of his defalcation during his first term of office.

2. **Same—County Treasurer.**

Where a county treasurer is directed by statute to check monthly upon the receipts of county funds paid to the register of deeds for fees received by him, and has failed in this duty for a long period of time, and thereby has given opportunity to the register of deeds to default in his payment to the county, the surety on the bond of the county treasurer conditioned upon his faithful performance of this duty is liable to the county for any loss thus sustained.

3. **Same—Equity—Subrogation.**

Where a county treasurer has neglected to check upon the register of deeds as to fees received by him as such officer, in an action by the county against the register of deeds and the sureties on his bond, and also against the county treasurer and the surety on his bond, the equitable principle of subrogation in favor of the surety on the latter's bond has no application.

4. **Damages—Speculative Damages—Accounting—References.**

Where a register of deeds has defaulted in paying over to the county moneys he has received as such officer, and the amount is capable of ascertainment by a reference and accounting, the recovery of this amount in an action against the register of deeds and his sureties is not speculative or remote.

APPEAL by defendants from *Cranmer, J.*, at November Term, 1926, of JOHNSTON. Modified and affirmed.

At February Term, 1926, of the Superior Court of Johnston County, three actions therein pending, in which the above-named plaintiff is the plaintiff and the above-named defendants, to wit: W. T. Adams and the Fidelity and Deposit Company; W. T. Adams and the Maryland Casualty Company; and J. A. Keen and the Maryland Casualty Company, are defendants, were referred by consent to Hon. J. C. Clifford. At the hearing before the said referee, on 26 March, 1926, these actions were consolidated for the purpose of trial and judgment. This action, resulting from such consolidation, was thereupon heard by the referee, who filed his report on 13 August, 1926, setting out therein his findings of fact and conclusions of law.

The report of the referee, together with exceptions duly filed by defendants J. A. Keen, the Fidelity and Deposit Company, and the Maryland Casualty Company, came on for hearing at the November Term, 1926, of said court; all exceptions, both to the findings of fact and conclusions of law, were overruled, and the findings of fact and conclusions of law of the referee, as set out in said report, were approved and adopted by the court.

From judgment in accordance with the report of the referee, defendants, other than W. T. Adams, appealed to the Supreme Court.

James D. Parker and Paul D. Grady for plaintiff.

Ed. F. Ward for defendant J. A. Keen.

S. Brown Shepherd and Wellons & Wellons for defendant Fidelity and Deposit Company.

F. S. Spruill and Ed. S. Abell for defendant Maryland Casualty Company.

CONNOR, J. Prior to the commencement of the actions which were consolidated by consent at the hearing before the referee, defendants W. T. Adams and J. A. Keen were register of deeds and auditor, respectively, of Johnston County, both having held their respective offices concurrently for two successive terms, each term being for two years. The surety on the official bond of W. T. Adams, register of deeds, for his first term is the Fidelity and Deposit Company; the surety on such bond for his second term is the Maryland Casualty Company. The surety on the official bond of J. A. Keen, auditor, for both his terms is the Maryland Casualty Company. Both W. T. Adams, as register of deeds, and J. A. Keen, as auditor, defaulted on their bonds for both terms. Plaintiff demands judgment that it recover of W. T. Adams, and the surety on his bond, for each term the amount of his defalcation for said term, and of J. A. Keen, and the surety on his bond, for both terms, the damages which it has sustained by reason of his default during each term.

Under the provisions of chapter 246, Public-Local Laws 1913, it was the duty of W. T. Adams, as register of deeds, during each of his terms of office, to collect and receive all the fees which belonged or appertained to his office, and to account for and pay over same to the treasurer of Johnston County; he was required by statute to pay the amounts collected and received by him to the said treasurer, on the first day of each month, or within five days thereafter. He was paid a salary as full compensation for his services.

The referee found that the amount of the defalcation of W. T. Adams, as register of deeds, during his first term of office, is $3,102.45; upon this finding, and pursuant to the referee's conclusion of law thereon, judgment was rendered that plaintiff recover of W. T. Adams the sum of $3,102.45, interest and costs, and of the Fidelity and Deposit Company, surety on his bond for his first term, the sum of $5,000—the penal sum of said bond—to be discharged upon the payment of the judgment rendered against W. T. Adams, principal on said bond.

The referee further found that the amount of the defalcation of W. T. Adams, as register of deeds, during his second term of office, is $9,171.25; upon this finding, and pursuant to the referee's conclusion of law thereon, judgment was rendered that plaintiff recover of W. T. Adams the sum of $9,171.25, interest and costs, and of the Maryland Casualty Company, surety on his bond for his second term, the sum of $5,000—the penal sum of said bond—to be applied as a payment on the judgment rendered against W. T. Adams, principal on said bond.

Under the provisions of chapter 246, Public-Local Laws 1913, it was the duty of J. A. Keen, as auditor, during each of his terms, to audit the books of W. T. Adams, register of deeds, at the end of each month, to ascertain the amount due by him for fees of his office collected or received during the preceding month, and to require the said W. T. Adams, as register of deeds, to pay over such amount, within five days, to the treasurer of Johnston County; and upon the failure of said W. T. Adams to account for and to pay over such amount to the said treasurer, to report such failure to the county attorney, whose duty it was to institute action, at once, against the said W. T. Adams, and the surety on his official bond, for the recovery of the amount in default.

The referee found that J. A. Keen failed to perform the duties of his office as auditor during both his terms, with respect to the office of the register of deeds, and that by reason of such failure the defalcation of W. T. Adams, with respect to the money collected by him each month, continued and increased, resulting in loss to Johnston County, which would not have occurred had the said J. A. Keen performed his duties as auditor; upon said finding, and pursuant to the referee's conclusion of law thereon, judgment was rendered that plaintiff recover of J. A. Keen and the Maryland Casualty Company, surety on the bond for his first term, the sum of $5,000—the penal sum of said bond—to be discharged upon the payment of the judgment herein rendered against W. T. Adams and the Fidelity and Deposit Company, for the amount of the defalcation of W. T. Adams during his first term as register of deeds, said term having been concurrent with the first term of J. A. Keen as auditor; and upon said finding, and pursuant to the referee's conclusion of law thereon, judgment was further rendered that plaintiff recover of J. A. Keen, as principal, and of the Maryland Casualty Company, as surety on his bond for his second term, the sum of $9,171.25, and interest, less such sum as shall be collected on the judgment herein rendered against W. T. Adams and the Maryland Casualty Company, surety on his bond for his second term, said term having been concurrent with the second term of J. A. Keen as auditor, the total liability of the Maryland Casualty Company, by reason of this judgment, in no event to exceed the penal sum of said bond, to wit: $5,000.

In determining the amount of the defalcation of W. T. Adams as register of deeds during his first term, the referee found that he was entitled to a credit of $3,604.60 as of 3 February, 1923, this being the amount paid by him on said date to the financial agent of plaintiff, who performed the duties of treasurer of Johnston County during both the terms of office held by W. T. Adams; this payment was made by W. T. Adams, two months after the beginning of his second term, and was applied by said financial agent pursuant to the direction of W. T. Adams on the amount of his defalcation during his first term, thus reducing the amount of such defalcation for which the Fidelity and Deposit Company, the surety on his bond for his first term, is liable. The referee found that "in making said payment of $3,604.60, W. T. Adams actually used the sum of $1,280.60, which he had collected by virtue of his office during the months of December, 1922, and of January, 1923, which months are included in his second term of office." He was accountable to Johnston County for said sum of $1,280.60 by reason of his liability under his bond for his second term. The referee concluded, as a matter of law, that "the fact that in payment of said sum of $3,604.60, the defendant W. T. Adams wrongfully used fees and public funds received by him during the first two months of his second term in the sum of $1,280.60, is immaterial, and that his first term of office is entitled to remain credited therefor."

To this conclusion of law by the referee, the defendant, the Maryland Casualty Company, surety on the bond of W. T. Adams for his second term of office as register of deeds, excepted. This exception was overruled at the hearing in the Superior Court. Said defendant assigns this as error, upon its appeal to this Court, contending that the said sum of $1,280.60, having been received by W. T. Adams during the term of his office covered by the bond upon which it is surety, and having been paid by him to the financial agent of plaintiff during said term, should be credited upon the amount for which it is liable, and not upon the amount of the defalcation during his preceding term.

In *S. v. Martin,* 188 N. C., 119, it is said in the opinion for the Court, written by *Stacy, J.:* "It is the established law of this jurisdiction that official bonds given by an officer during any one term of his office are cumulative; that is, the first bond given is liable for defaults occurring throughout the entire term, and any new bond given at a later period during the same term is an additional security for the faithful discharge of such of the duties as have not been performed at the time of its execution. . . . But we are aware of no decision or statute which would make the official bond or bonds given by an officer during one term liable for the nonperformance of his official duties during another and different term, even though the principal and sureties are the same for both terms. The two terms are separate and distinct, and the bonds given by an officer as security for the performance of his official duties during any one term may not be held liable for derelictions occurring in another and different term, in the absence of some contract or statute imposing such liability. *Ward v. Hassell,* 66 N. C., 389. Each term, like every tub of Macklinian allusion, must stand on its own bottom."

It is contended, however, that this latter principle is not applicable upon the facts of this case. The question, therefore, presented for decision is whether a public officer, holding a second term of his office, immediately succeeding a first term of the same office, who has defaulted upon bonds given by him for each term, and is by reason of such defaults indebted to the obligee of both bonds, upon separate and distinct liabilities, may direct that a payment made by him during his second term to the obligee, his creditor, with funds for which his bond for said term is liable, shall be applied to the discharge, *pro tanto,* of his liability under his bond for his first term, thereby reducing the amount for which the surety on his bond for the first term, and increasing the amount for which the surety on his bond for the second term, is liable to the obligee or beneficiary in both bonds. Is the application of such a payment made by the obligee pursuant to the direction of the principal, a public officer, binding upon the surety for the second term?

The surety has undertaken that his principal, the public officer, shall properly account for and pay over to the obligee or beneficiary of the bond all public funds which the officer shall receive and collect by virtue of his office. When these funds are accounted for and paid over to the obligee or beneficiary in accordance with the terms of the bond, the law applies them as payments on the amount for which the surety is liable. No application of such funds made by the obligee or beneficiary, although pursuant to the direction of the principal, can be binding on the surety, without his consent to such application. If at the time of such payment the obligee or beneficiary was ignorant of the source of the funds with which the payment was made, but thereafter discovers that such funds were received and collected by the principal under a bond upon which a surety is liable, and that an application made pursuant to the direction of the principal is prejudicial to such surety, the application should be set aside, upon the demand of the surety, where, as upon the facts of this case, the said obligee or beneficiary will suffer no loss thereby. A payment made by the principal in a bond to the obligee or beneficiary therein with funds for which the bond is liable must be applied to the discharge, *pro tanto,* of the surety liable for said funds, where the obligee or beneficiary has notice at the time the payment is made of the source of the funds with which the payment is made.

We have examined with care the decisions of courts of other jurisdictions cited in support of the referee's conclusions of law, and of the judgment in accordance therewith. Some of the cases in which these decisions were made are distinguishable from the instant case. The controversy in those cases was between the obligee or beneficiary and the surety with respect to an application of payments in accordance with the direction of the principal, made with funds which came into the hands of the principal, a public officer, during his second term, for which the surety was liable, to a defalcation of the officer during a preceding term of the same officer, for which the surety was not liable. In those cases the contention of the surety was that he was released by such application. In the instant case, in which the sureties on the bonds for both terms are parties, the controversy is solely between such sureties as to the amount for which they are respectively liable on account of the defaults of their principal, during the term of office for which each was surety. The actions instituted upon each bond were consolidated by consent of all the parties, and as now constituted, is in effect for an accounting. There was error in overruling the exception of the Maryland Casualty Company with respect to the application of the sum of $1,280.60; this sum should be applied by the court as a payment on the amount for which the bond for the second term is liable. The surety on the bond for the first term is not entitled to a credit on the amount of his liability for said sum.

This decision is in accordance with the law as stated in the note to be found in 21 A. L. R., at page 725. The annotator has cited and reviewed the decisions upon this question, and says: "Accordingly, payments with funds properly pertaining to the term for which an official bond is given cannot, as against the sureties on that bond, be diverted to an earlier or later term; at least, if the official receiving the payment knows the source of the funds." We hold that, in an action to determine the amount for which the respective sureties on official bonds for separate and distinct terms are liable, when it appears that a payment made by the principal, a public officer, has been improperly applied by the obligee or beneficiary, although pursuant to the direction of such officer, the court should set aside such application. Payments made with funds received or collected by the officer should be applied upon the amount of his indebtedness for the term during which such funds were collected. This is just, and cannot result in wrong to any interested party to the action.

We find no error in the judgment with respect to the application of the sum of $2,906.35, paid by W. T. Adams to the financial agent of plaintiff on 29 November, 1924. This sum was paid by check drawn on the bank with which W. T. Adams deposited the funds received and collected by him, from time to time, as register of deeds. It was paid during his second term, with funds collected during said term, and was properly applied in the judgment upon the amount due by W. T. Adams as register of deeds for his second term.

The referee expressly finds that no direction was given by W. T. Adams as to the application of this payment. The fact that the proceeds of a note discounted by the bank for W. T. Adams were deposited to the credit of his account, upon which the check was drawn, and to which it was charged by the bank, is immaterial, in view of the finding by the referee that there were funds to the credit of said account at the time the check was drawn sufficient to pay the check, which were collected during the second term.

The contention of the defendant, the Fidelity and Deposit Company, with respect to the application of this payment, made in the judgment, in accordance with the referee's finding of fact and conclusion of law, is not sustained.

Nor is there error in the judgment against J. A. Keen and the surety on his bonds as auditor, as contended by defendant, the Maryland Casualty Company. His defaults in the performance of the duties of his office during both his terms, with respect to the office of register of deeds, will necessarily result in loss to Johnston County if W. T. Adams is insolvent, and the judgments rendered against him cannot be collected. The liability of the surety on his bond for each of his terms is limited to the penal sums of said bonds, to wit: $5,000. This sum was sufficient to protect the county from loss on account of any default by the register of deeds, with respect to money collected and received by him by virtue of his office during any month of either of his terms, and in his hands at the end of such month, when he was required by law to settle with the treasurer or financial agent of the county. If the auditor had performed his duties as prescribed by law, the amount for which the register of deeds and the surety on his bond was liable would never have exceeded the penal sum of the bond. As the result of the defaults of the auditor, the defalcation of the register of deeds continued from month to month, increasing in amount. The loss or damage that will be sustained by the county, in the event that it fails to collect the judgments recovered against W. T. Adams and the sureties on his bonds, is easily ascertained. It is not speculative or remote. Such loss or damage is easily ascertained by a simple calculation. The contention of defendant, the Maryland Casualty Company, with respect to the judgments against J. A. Keen and his surety is not sustained.

Other assignments of error have been carefully considered. They cannot be sustained. The principle of subrogation invoked by defendant, the Fidelity and Deposit Company, cannot be applied upon the facts of this case. Plaintiff has in hand no additional security for the amount for which this defendant is liable under the terms of the bond as surety. The amount which plaintiff will collect on its judgment against J. A. Keen and his surety, the Maryland Casualty Company, for his first term as auditor cannot be determined until it has first collected its judgment against W. T. Adams and the Fidelity and Deposit Company, his surety on his first term as register of deeds.

As modified in accordance with this opinion, with respect to the application of the payment of the sum of $1,280.60, the judgment is

Affirmed.

H. G. SHERRILL v. JNO. P. LITTLE ET AL.

(Filed 11 May, 1927.)

Release—Contracts — Negligence — Fraud — Ratification — Rescission—Equity.

Where a master is liable in damages to its employee for a serious injury caused by its negligence, and while the employee is too incapacitated physically and mentally to understand it, obtains a release, upon a reasonably fair consideration to be paid at stated periods, from all liability for damages that may thereafter be claimed, and continues to receive these payments knowingly as paid upon the release after he has had full opportunity to acquaint himself with and understand its terms, he may not thereafter disregard his release though obtained by fraud and overreaching, and maintain an action to recover the actual amount of the damages.

CIVIL ACTION, tried before *R. Lee Wright, Emergency Judge,* at January Special Term, 1927, of MECKLENBURG.

The evidence tended to show that the plaintiff was a carpenter, employed by the defendants, who were engaged in the business of general contractors and builders in the city of Charlotte.

On 1 October, 1924, the plaintiff was directed to straighten up some of the upright posts that were out of line on the Charlotte Speedway grandstand. While engaged in this work, the scaffold upon which plaintiff was standing gave way and he fell, sustaining serious injuries. He was taken to the hospital, where he remained twenty-three days, and then returned to his home in Newton. On or about 1 May, 1925, the plaintiff returned to work for the defendants, and worked with them until October, 1925. Plaintiff testified that, at that time, they told him if he wanted to go up to Salisbury they would see whether or not they could get work for him. Plaintiff declined to go to Salisbury, and his employment with the defendants was thereupon terminated.

On 3 October, 1924, on the third day after his injury, and while in the hospital, plaintiff signed a release, which is in words and figures as follows:

"In consideration of the release hereinafter set out, the undersigned, John P. Little & Son, hereby agree to pay the doctor's bills, hospital bills, and time lost by the undersigned, H. G. Sherrill, on account of injuries received by his falling from a scaffold while working on the grandstand at the Speedway near Pineville, N. C., time lost to be paid for at the rate of sixty cents (60c.) per hour, forty-eight (48) hours per week: *Provided, however,* that this shall not be paid for longer time than said Sherrill is disabled from work on account of said injury, this to be left to the decision of Dr. C. M. Strong, nor in any event for a longer time than three months from the date of said injury, which was on 1 October, 1924.

"And in consideration of the agreement aforesaid on the part of John P. Little & Son, the said H. G. Sherrill hereby agrees to release and does release the said John P. Little & Son from all further liability on account of said injuries; it being understood that this is a full settlement between the parties for all damages sustained by said H. G. Sherrill on account of said accident. And it is understood that the said John P. Little & Son do not admit negligence or responsibility on their part for said accident."

In accordance with the terms of this release, the defendants sent the plaintiff a check for $36 each week until about 1 May, 1925, when the plaintiff returned to work. The doctor's bill was $210, and the hospital bill $153.25, and including these items and some small expense items, the defendants paid the plaintiff under the contract the sum of $1,569.50. At the time the release was signed, a copy thereof was left with the plaintiff, which he produced at the trial.

The issues and answers of the jury thereto were as follows:

"1. Did the plaintiff, at the time of executing the release set forth in the answer of the defendants, have sufficient mental capacity to understand the nature and legal effect of said release? Answer: 'No.'

"2. If not, did the defendants, or either of them, have notice at the time of the execution of the said release of plaintiff's lack of such mental capacity? Answer: 'Yes.'

"3. Did the plaintiff ratify the said release by continuing to receive payments of the installments of the consideration mentioned in the said release after having knowledge of the nature and contents of the said release? Answer: 'No.'

"4. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: 'Yes.'

"5. Did the plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: 'No.'

"6. Did the plaintiff assume the risks incident to his employment, as alleged in the answer? Answer: 'No.'

"7. What damages, if any, is the plaintiff entitled to recover? Answer: '$3,000, plus $1,553.50—$4,553.50.'"

Judgment was entered upon the verdict, and the defendants appealed.

McCall & Humphrey for plaintiff.
C. H. Gover for defendants.

BROGDEN, J. There was sufficient evidence of negligence to be submitted to the jury. There was also sufficient evidence to be submitted to the jury on the first and second issues, as to whether or not the plaintiff had sufficient mental capacity to understand the legal effect of the release at the time it was executed, and of notice to the defendants of such incapacity.

The merits of the case revolve about the question as to whether or not the plaintiff ratified the release, even conceding that it was secured by means of fraud and over-reaching.

The law with respect to releases has been thoroughly examined and set forth in an exhaustive and well-considered opinion by *Justice Connor* in *Butler v. Fertilizer Works, ante,* 632. The *Butler case, supra,* deals primarily with the principles of law affecting the validity of releases, and is a recapitulation and reëxamination of the law with regard to circumstances and conditions warranting the rescission of such instruments. The case at bar involves the facts and circumstances under which a release may be upheld. "A release executed by an injured party and based upon a valuable consideration is a complete defense to an action for damages for the injuries, and where the execution of such a release is admitted or established by the evidence, it is necessary for the plaintiff to prove the matter in avoidance of the release." *Aderholt v. R. R.,* 152 N. C., 412.

The plaintiff contends that the release is not binding by reason of the fact that he did not understand what he was doing when it was signed, and that the defendants, with unseemly haste, presented the paper to him without any explanation of its terms whatever, and secured his signature at a time when he was suffering such pain as to be unable to understand its effect and meaning.

The defendants deny that any fraud was practiced upon the plaintiff, but contend that, even though the plaintiff did not understand the paper at the time it was signed, his acceptance of the benefits specified therein for a period of seven months amounts to a ratification of the contract, irrespective of its alleged fraudulent inception.

These contentions require an examination of the evidence to the end that the principles of law may be properly applied.

Plaintiff testified as follows: "The accident happened between eight and nine o'clock in the morning. I don't remember anything else the balance of that day. I regained consciousness the next day about ten o'clock. . . . They told me that my wife came the second day after I was hurt. . . . They said she was with me on 3 October. . . . I remember her being at the hospital, but I don't remember the time it was. The signature on this paper is mine. (Referring to the release.) I gave this paper to my attorney, or one like it. . . . My wife gave me that paper after I went home from the hospital and after I went back to Newton. I don't remember when she gave it to me after I went home. I went home on 23 October. . . . I don't remember anything about what took place at the time I signed this paper. . . . I don't remember a thing on earth about signing this paper. . . . When I went home my wife gave me this paper, and I read it then. I didn't understand it altogether. I really did not understand the meaning of the wording. I haven't got no education. As to whether I understood enough about it to send down to J. P. Little & Son and get the checks, they mailed them to me. I don't know as I sent for them. After I got well enough I did go to the office of J. P. Little & Son. . . . I got a check practically every week from J. P. Little & Son from the time I got hurt until I went back to work for them. I got a check from them practically every week from the first of October, 1924, until some time in May, 1925. At the time in May, 1925, mentioned, I went back to work for J. P. Little & Son. They continued to employ and pay me until they brought me a check one evening and told me they did not need me back there. This was 1 October, 1925. It is a fact that I was paid so far as I can recall every week from 1 October, 1924, until May, 1925, at the rate of $36 per week, or sixty cents an hour. This was according to what the contract of J. P. Little & Son called for when I seen it. I knew the checks were being sent to me every week by J. P.

Little & Son according to the terms of this contract here (referring to the release). I knew they were carrying out their contract with me and giving me a check every week. . . . If my wife showed me this paper (the release) in the hospital, I don't remember about it. She talked to me about it while I was in the hospital, but if I saw it or read it or heard it read, I don't know it. . . . I got checks while I was in the hospital. According to what my wife told me, these checks were sent pursuant to the terms of that paper, but I did not know. . . . The paper said that it released J. P. Little & Son from liability on account of the injuries. I understood the reading when I read that part of it. I understood what the language meant. I did not understand exactly that it put me out as to where I could not get anything if I never got well. My understanding was that I was to get well, sound like I was. When my wife gave me the paper at Newton, I did read it. . . . I never did object to the contract, and did not go to them. I never said a word to them about objecting to the contract that I know of. . . . I was not satisfied from the first. . . . I don't know what time after I got home my wife showed me the release signed by me. I wouldn't be sure I read it before some time in December. I will admit reading it by that time. . . . I will also admit that I endorsed and cashed those checks and got the money. I knew in cashing those checks that this paper was in existence."

The general principle of ratification is thus expressed in Ruling Case Law, vol. 23, p. 389: "A release, originally invalid or voidable for any reason, may be ratified and affirmed by the subsequent acts of the persons interested. Thus, if one, while his reason is temporarily dethroned, executes a release, and, after being restored to his proper faculties, knowingly takes the benefit of his contract, he thereby ratifies and gives it force and effect. . . . And there can be no ratification or affirmance unless the plaintiff knew, or ought to have known, all the facts and circumstances attending the act to be ratified. Ratification presumes the existence of knowledge of all the facts, and one not informed of the whole transaction is not in a position to ratify the same. Nor is the receipt of money an affirmance of a release, unless paid in satisfaction of the plaintiff's cause of action, or received after he knew, or ought to have known, that he had a cause of action, and that the money was paid in satisfaction of it." This general principle of law is fully recognized and is given full force in the decisions of this State. *Dellinger v. Gillespie,* 118 N. C., 737; *Kerr v. Sanders,* 122 N. C., 635; *May v. Loomis,* 140 N. C., 359; *West v. R. R.,* 151 N. C., 231; *Bank v. Justice,* 157 N. C., 373; *Starkweather v. Gravely,* 187 N. C., 526; *Waggoner v. Publishing Co.,* 190 N. C., 831; *McNair v. Finance Co.,* 191 N. C., 710. In *Dellinger v. Gillespie, supra,* the Court said: "Upon discovering that the written contract was unlike the contract which he alleged he had made with the plaintiff, he should not have allowed the work to go on. Equity will not permit him, under such circumstances, even if there was fraud in the contract, to allow the plaintiff to complete the work and then refuse to pay for it. If the contract had been procured through fraud, as the defendant alleged, he ought, when he had examined it the next morning before Uzzell began the work, to have repudiated it and have forbidden the commencement of the work, or he should have made his election to abide by it, as it was written, with the explicit declaration, then made, of his intention to sue the plaintiff in damages for the deceit."

Applying the established rules of law to the facts of this case, it appears that, after the plaintiff had left the hospital, he continued to receive payments from the defendants, and at the time knowing that such payments were made in accordance with what the "contract with J. P. Little & Son called for." And said payments were accepted with the further knowledge on the part of the plaintiff that the contract "released J. P. Little & Son from liability on account of the injuries."

The defendants, in apt time, and in writing, requested the court to instruct the jury to answer the third issue, as to ratification, "Yes." We are of the opinion, and so hold, that the defendants were entitled to this instruction, and that the court was in error in declining to give it.

The plaintiff relies upon the case of *Mensforth v. Chicago Brass Co.,* 126 N. W., 41. In the *Mensforth case* plaintiff received a serious injury and signed a release for the sum of $100, which, at most, was but a trifling amount. The paper was signed when the plaintiff had only been in the hospital ten days, and he remained there fourteen or fifteen weeks thereafter. It appears that the $100 was paid to the plaintiff in three installments, but it further appears that "nothing was said when the money was paid to him as to what it was for." In the case at bar, the plaintiff was thoroughly advised as to what the money was for, and, according to his own statements upon the witness stand, knew that the paper-writing released the defendant from liability. Even if the defendants acted with undue haste in securing a release, the record discloses that they were not disposed to drive a hard bargain with the plaintiff; for, although the contract specified they were to pay no compensation in excess of a period of three months, yet the defendants did not stand upon the letter of the bond, but actually paid compensation to plaintiff for seven months, and until he was able to resume his labors with them.

Error.

FLODA P. LENTZ v. JOHN W. LENTZ.

(Filed 11 May, 1927.)

Judgments—Consent—Contracts—Courts—Marriage—Divorce.

A consent judgment is an agreement or contract made by the parties, entered with the sanction of the court, and without the consent of the parties to vacate or moderate it, the court is without power to do so. And where it is entered in a suit for divorce brought by the wife in which her husband is required to pay certain sums of money at stated intervals for the support of the wife and the child of the marriage as long as she may remain unmarried, the later absolute divorce granted in her independent action is not a violation of the terms of the consent judgment, and the Superior Court judge has no authority to modify it upon that ground.

APPEAL by plaintiff from *Oglesby, J.*, at January Term, 1927, of CABARRUS. Reversed.

Armfield, Sherrin & Barnhardt for plaintiff.
Hartsell & Hartsell for defendant.

PER CURIAM. Plaintiff instituted an action against defendant for "alimony without divorce." C. S., 1667. At August Term, 1924, judgment for plaintiff was signed by the judge presiding, as follows:

"This cause coming on to be heard, and the same having been compromised upon the following terms:

"The defendant is to pay into the office of the clerk of the Superior Court, on or before the first day of each month, for fifteen consecutive years, the sum of $25 per month, for the use and benefit of Floda P. Lentz and her child, Charles Timothy Lentz, provided that in case of marriage of Floda P. Lentz said compensation is to terminate.

"It is therefore, upon motion of Maness & Sherrin, counsel for the plaintiff, ordered and adjudged by the court that the plaintiff, Floda P. Lentz, do recover of the defendant, J. W. Lentz, the sum of $4,500, and the cost of this action be taxed against the defendant by the clerk of this court.

"It is, by consent of the plaintiff, ordered and adjudged that the defendant shall pay into the office of the clerk of the Superior Court of Cabarrus County the sum of $25 on the first of each month hereafter, until the total amount of the first judgment is extinguished, and it is also adjudged that the said judgment shall not bear interest, except on such amount or amounts that the defendant may default in paying monthly: *Provided, however,* that in case of remarriage of the plaintiff, then the payment shall at once cease, and the judgment herein rendered shall be marked 'Satisfied' by the clerk of the Superior Court of Cabarrus County; otherwise, to remain in full force and effect." Below the judgment is the following: "We hereby consent to and agree to the foregoing judgment. Floda P. Lentz, by Maness & Sherrin, attorneys; John W. Lentz, by Hartsell & Hartsell, attorneys."

At January Term, 1927, the court below found the following facts: "Floda P. Lentz brought an action against John W. Lentz under section 1667 of the Consolidated Statutes for alimony without divorce. A consent judgment was entered, which is filed in this record. The plaintiff Floda P. Lentz filed an affidavit and an order was issued by the clerk of the Superior Court to the defendant John W. Lentz to show cause why he should not be attached for contempt for failure to pay the amount contained in the consent judgment. The court finds that the defendant complied with the judgment by paying twenty-five dollars per month until 7 August, 1926, the next payment being due on 1 September, 1926. The court finds that the said Floda P. Lentz obtained an absolute divorce at the August Term, 1926, of the Superior Court of Cabarrus County, judgment in the cause appearing in the record. . . . The court further finds that the petitioner, Floda P. Lentz, has not remarried, and that Charles Timothy Lentz, of age six years, is living, being the child of said marriage."

The judgment of the court below, at January Term, 1927, was as follows: "This cause coming on to be heard, and being heard by petition filed by the plaintiff, after hearing, the court modifies and amends the judgment previously made, and orders the defendant John W. Lentz to pay to the court the sum of twelve and 50/100 dollars per month from August, 1926, for the use and support of the minor child of said marriage, and to pay $25 attorneys' fee for the use of counsel for petitioner."

The court below finds "A consent judgment was entered."

In *Ellis v. Ellis, ante*, at p. 219, quoting many authorities, this Court held: "A judgment or decree entered by consent is not the judgment or decree of the court, so much as the judgment or decree of the parties, entered upon its records with the sanction and permission of the court, and being the judgment of the parties, it cannot be set aside or entered without their consent." *Board of Education v. Comrs.*, 192 N. C., p. 274.

No fraud or mistake is alleged. The judgment is a contract, and binding between the parties. Plaintiff has not breached the condition and married. The divorce obtained by plaintiff does not affect the contract.

For the reasons given, the judgment of the court below is

Reversed.

M. R. WALDEN v. C. C. CHEEK.

(Filed 11 May, 1927.)

Appeal and Error—Record—Pleadings—Dismissal—Statutes.

The rule requiring that the pleadings be made a part of the record on appeal is mandatory, and the appeal will be dismissed when not complied with, and the certificate of the Superior Court clerk that a pleading had been lost in his office will not avail the appellant when it does not appear that a substitution cannot be made under the provisions of the law. C. S., 544.

APPEAL by defendant from *McElroy, J.,* at July Term, 1926, of RANDOLPH. Appeal dismissed.

From judgment upon the verdict, as set out in the record, defendant appealed to the Supreme Court.

No counsel for plaintiff.

C. N. Cox and Brittain, Brittain & Brittain for defendant.

PER CURIAM. The transcript of the record filed in this Court, upon defendant's appeal, does not contain the pleadings upon which the action was tried in the Superior Court. It contains only the reply of plaintiff to the further defense set up in the answer. This is not in compliance with Rule 19, 192 N. C., 847.

It is provided in said rule that "it shall not be necessary to send as a part of the transcript, affidavits, orders, and other process and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement, which shall be made a part of the record, as to the parts to be transcribed, and in the event of disagreement of counsel, the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the action is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up."

It appears from an affidavit of the clerk of the Superior Court that since the trial the original complaint and answers have been lost, and that although he has made a diligent search for same, he has been unable to find them. It does not appear that application was made to the court for leave to file copies, C. S., 544, or that counsel are unable to file substitutes for the originals.

This appeal must be dismissed for failure to comply with the foregoing rule. The requirement of the first proviso is mandatory; it cannot be dispensed with.

Dismissed.

CONTINENTAL TRUST COMPANY v. D. W. SPENCER, RECEIVER OF JACKSON LUMBER COMPANY.

(Filed 18 May, 1927.)

Banks and Banking—Bills and Notes—Negotiable Instruments—Depositors—Debtor and Creditor—Offset—Corporations—Insolvency.

Where the directors of a corporation in their endeavor to prevent its insolvency make a cash payment on the matured corporation note given to the bank and give their individual note for the balance, the bank retaining the old note as collateral, upon the corporation's becoming insolvent and in a receiver's hands, under the relationship of debtor and creditor, the bank has a right in equity to offset the indebtedness on the note of the corporation deposited therein, though the note given by the directors may not have become due at the time.

APPEAL by defendant from *Finley, J.*, at March Term, 1927, of MECKLENBURG. Affirmed.

D. E. Henderson for plaintiff.
D. W. Spencer for defendant.

CLARKSON, J. This is a submission of controversy without action, under C. S., 626. The plaintiff is a banking corporation. The Jackson Lumber Company is a corporation, insolvent, and D. W. Spencer is the receiver. The Jackson Lumber Company borrowed from the plaintiff bank on 12 June, 1926, $9,000, and made its promissory note due at 90 days, maturing 10 September, 1926. The Jackson Lumber Company, at the maturity of the note, was unable to pay the same, and the directors of the corporation paid $1,000 on the note, and on 10 September, 1926, executed a 30-day note for $8,000, and as collateral security the bank took the past due note of the Jackson Lumber Company for $9,000.

On 29 September, 1926, the Jackson Lumber Company had on deposit in plaintiff's bank $949.77, and on said date the plaintiff learned of the insolvency of the Jackson Lumber Company, which was placed in the hands of the receiver that day. Plaintiff, on learning of the insolvency, transferred and applied as a credit on the note of the Jackson Lumber Company for $9,000, reduced by the directors to $8,000, the $949.77. The defendant receiver contends that this was illegal, and this is the sole question involved in the appeal. We cannot so hold.

As between plaintiff and the Jackson Lumber Company the relationship, under the facts and circumstances of this case, was that of debtor and creditor, and the bank had the right to apply the deposit on the past due note of the Jackson Lumber Company. The fact that the note of the directors was not due did not affect the rights of plaintiff. In fact, it is held by this Court in *Hodgin v. Bank,* 124 N. C., at p. 542: "Even if the indebtedness to the bank has not matured, if the depositor becomes insolvent, the bank by virtue of the right of equitable set-off may apply the deposits with it of such debtor to his indebtedness. *Dammon v. Bank,* 50 Mass., 194; *Flour Co. v. Bank,* 90 Ky., 225; *Trust Co. v. Bank,* 91 Tenn., 336; *Seed Co. v. Talmage,* 96 Ga., 254; Waterman on Set-off, 432." Reversed on another point in 125 N. C., p. 503.

The principle applicable here is set forth in Morse on Banks and Banking, vol. 1, 5 ed., p. 630, part sec. 337, citing numerous authorities: "The various items of deposit with and payment by the bank from a running account between the bank and the customer. *For any indebtedness accruing from the customer to itself, the bank has the right to set-off.* If the depositor becomes bankrupt, his deposit becomes security for the payment of his debt to the bank. If this debt be contingent in character, or if it be a claim for unliquidated damages, arising out of a contract, then the bank may retain possession of the deposit until such time as the probable indebtedness shall be ascertained, when the deposit may be set off against it." (Italics ours.)

In *Davis v. Mfg. Co.,* 114 N. C., at p. 328, where the matter is fully discussed, it is said: "It may be well here to note precisely who are meant by debtors and creditors of the insolvent bank, as the terms are used in this discussion of the rules of equity that should control the settlement of its affairs. By debtors to the bank are meant all those who, at the appointment of the receiver, were liable to the bank for the payment of money, whether their liability had *matured or not,* and without any regard to the exact nature of the liability, *whether as principal or surety.*" (Italics ours.)

In a court of equity, seeking to do justice among all parties, it looks at the spirit and not the form of the transaction. It cannot be disputed that the Jackson Lumber Company was primarily liable to the bank. The directors, although making a note to the bank, and the bank taking the Jackson Lumber Company's past due note as collateral security, the directors did so as an accommodation for the Jackson Lumber Company. It does not appear that the directors had any purpose except to save, if possible, the Jackson Lumber Company, which from subsequent developments showed was on the verge, if not then, insolvent. Any other view, under the facts and circumstances of this case, would work an unjust hardship on faithful directors trying to save an insolvent corporation. The primary liability was the Jackson Lumber Company—the directors were in effect sureties. We think the position here taken borne out by the weight of authorities. *Moore v. Bank,* 173 N. C., p.

180; *Trust Co. v. Trust Co.*, 188 N. C., p. 766; *Graham v. Warehouse*, 189 N. C., p. 537; see *Hayden et al. v. Citizens Nat. Bank et al.*, 35 A. & E. Annotated Cases, p. 686.

Some of the decisions in other jurisdictions may be contrary to the view here taken, but a liberal and righteous adjustment between the parties should prevail. We think the majority rule is with the holding in this case and consonant with equity and justice.

For the reasons given the judgment is

Affirmed.

STATE v. THOMAS BRINKLEY, JR.

(Filed 18 May, 1927.)

1. **Criminal Law—Admissions—Prostitution—Courts—Findings of Fact—Judgment—Statutes.**

   Where the general plea of guilty is made by the defendant charged with the offense of prostitution, and accepted by the court, the submission is sufficiently broad to cover the two degrees set out in the statute, C. S., 4361, 4362.

2. **Same—Limitation of Actions.**

   Where the defendant upon trial for prostitution submits the plea of guilty without reservation, which is accepted by the court, he may not maintain the position that the punishment for the offense was barred by the statute of limitation of actions, as the time and place of its commission are not necessary to constitute the offense.

3. **Same—Pleas.**

   For a person charged with the commission of a criminal offense to avail himself of the alleged running of the statute of limitations, he must either specifically plead it or in apt time bring it to the attention of the court.

4. **Same—Indictment.**

   A defendant sentenced for the crime of prostitution upon his own admission of guilt, may not successfully resist a sentence therefor upon the ground that the offense charged in the indictment did not come within the period of time prescribed by the statute.

APPEAL by defendant from *Stack, J.*, at October Term, 1926, of CABARRUS. No error.

The defendant was indicted for seduction under C. S., 4339, and tendered a general plea of guilty of prostitution, which was accepted by the State. The judge then heard the testimony of several witnesses and found as a fact that the defendant was guilty of prostitution in the first degree. It was thereupon adjudged that the defendant be imprisoned and assigned to work on the public roads of Cabarrus County for a term of eighteen months, and he excepted and appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Caldwell & Caldwell and Hartsell & Hartsell for defendant.

ADAMS, J. The appeal presents three contentions: (1) That the judge had no right to determine from the testimony of witnesses that the defendant was guilty of prostitution in the first degree; (2) that the prosecution is barred by the statute of limitations; (3) that the judgment should be arrested.

The crime of prostitution is divided into two degrees and the punishment for each is prescribed by statute. C. S., 4361, 4362. For the first degree the offender shall be subject to imprisonment for not less than one nor more than three years, and for the second to imprisonment for not more than one year. When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the term of imprisonment within the limits of the statute; but this right does not extend to or include the finding by the judge of the degree of the offender's guilt. Whether the determination of the degree is the province of the judge or that of the jury is a question we need not now discuss; for the defendant's general submission, without pointing out or specifying the degree of his guilt, is sufficiently comprehensive to include the first degree. *S. v. Barnes,* 122 N. C., 1031; *S. v. Lee,* 192 N. C., 225.

The second point made by the defendant is without merit. In *S. v. Carpenter,* 74 N. C., 230, it is said: "We believe a practice has grown up under which the State does not usually, in the trial of misdemeanors, prove in the first instance venue, time, etc., unless some point be made thereon." The Court announced in *S. v. Holder,* 133 N. C., 710, that if the statute of limitations is relied on it should be brought to the attention of the judge, and in *S. v. Francis,* 157 N. C., 612, that if the State fail to prove that a misdemeanor was committed within two years the defendant should take advantage of the failure by a request for instruction. That the prosecution is barred is shown under the general plea, and if it is barred the defendant is held to be not guilty. *S. v. Moore,* 82 N. C., 660, 662; *S. v. Berry,* 83 N. C., 604; *S. v. Clarke,* 85 N. C., 555, 559; *S. v. Jones,* 101 N. C., 719; *S. v. Frisbee,* 142 N. C., 671. But in the case under consideration the defendant expressly pleaded his guilt and the State accepted his plea, which was equivalent to a conviction. *S. v. Branner,* 149 N. C., 559; C. S., 4610. Admitting his guilt, he says that he is not guilty because the offense with which he is charged is "out of date." *Allegans contraria non est audiendus*—one alleging things that are contradictory is not to be heard.

As ground for arresting the judgment the defendant says that the time specified in the bill of indictment was not within the period limited by the statute (C. S., 4512), and that for this reason the prosecution cannot be maintained. The position is untenable. Time is not of the essence of the offense charged, but is a matter of proof, and "averment of the time when the act was done, unless essential to its criminality, is not traversable." *S. v. Taylor,* 83 N. C., 601; *S. v. Clarke, supra.* Besides this, the defendant, as we have said, admitted his guilt of prostitution and the words "under the bill of indictment" do not modify the effect of his admission. We find

No error.

E. H. WALLER ET AL. v. C. A. DUDLEY, JR.

(Filed 18 May, 1927.)

1. **Appeal and Error—Case—Signature of Judge—Judgment Affirmed—Record—Courts—Ex Mero Motu.**

Where it appears from the record that the judge has not signed what appears to be his settlement of the case, and no agreed case has been included, and where the appellee has not made a motion to affirm the judgment the court, in the absence of error appearing in the record proper, will not be disposed *ex mero motu* to exercise its power to do so.

2. **Appeal and Error—"Case"—Settlement of Case—Duty of Appellant—Redrafting of Case—Signature of Judge.**

It is required of the appellant to redraft the case on appeal when the judge in settling it has modified his case by adopting portions of the exceptions or countercase of the appellee, etc., and have the judge to sign the case so redrafted and incorporate it in the record. C. S., 642, 643, 644.

3. **Same—Remand—Printing.**

This appeal is remanded to the end that the appellant may have the "case" on appeal signed by the trial judge or do so after making such changes therein as will make it conform to the case as tried, the appellant using in this instance the printing in the present record, if so advised, to the extent reasonably available.

APPEAL by defendant from *Devin, J.,* at November Term, 1926, of LENOIR.

Civil action in trespass to recover damages for an alleged wrongful cutting of plaintiff's timber. A question of boundary being involved, the case was referred under the statute. Exceptions were duly filed to the report of the referee and a jury trial demanded.

From an adverse jury verdict and judgment thereon, the defendant gave notice of appeal to the Supreme Court.

Rouse & Rouse and Sutton & Greene for plaintiffs.
Shaw & Jones for defendant.

STACY, C. J. The record in this case has been brought up in response to a writ of *certiorari,* but it contains no proper statement of case on appeal. The "case," as settled by the trial judge, is not signed by him, and there is no agreed statement of the case. This is a matter of procedure which the appellant should have given proper attention. C. S., 642, 643 and 644; *Ingram v. Power Co.,* 181 N. C., 359. With no errors appearing on the face of the record proper, the judgment might well be affirmed, but, as no motion to this effect has been made by the appellees, the Court, under the circumstances, is not disposed to enter the order *ex mero motu.* The proper motion, in the absence of errors appearing on the face of the record, or properly assigned, is to affirm the judgment. *Mfg. Co. v. Simmons,* 97 N. C., 89. The motion of appellees to dismiss the appeal must be overruled. *Walker v. Scott,* 102 N. C., 487.

Where the appellees file exceptions to the statement of case on appeal as tendered by appellant, and the trial court, as here, adopts appellant's statement of case as amended by "appellees' exceptions with modifications as indicated," it is the duty of the appellant to have the statement of case on appeal, as thus modified, redrafted and submitted to the judge for his signature. *Gaither v. Carpenter,* 143 N. C., 240. "When he fails to do this, but merely sends up his statement of case, together with appellee's exceptions and the order of the judge, there is no 'case settled on appeal,' and the Court (if no errors appear on the face of the record proper) may, on motion of appellee, or *ex mero motu,* either affirm the judgment or remand the case." *Mitchell v. Tedder,* 107 N. C., 358.

The cause will be remanded, to the end that the appellant may have an opportunity to comply with the order of the court by redrafting and reforming the case on appeal and submitting the same to the judge for his signature. *McDaniel v. Scurlock,* 115 N. C., 295; *Hinton v. Greenleaf, ibid.,* 5.

It will not be necessary to have the entire statement of case on appeal reprinted if, upon inspection, the judge is disposed to approve the case as it now appears on the record. In this event, a supplemental order will suffice. *Stevens v. Smathers,* 123 N. C., 497.

Remanded.

C. W. WISEMAN ET AL. v. C. W. LACY ET AL.

(Filed 18 May, 1927.)

Roads and Highways — Principal and Surety — Indemnity Bonds — Materialmen—Labor—Renting of Necessary Machines and Implements.

The surety on a contractor's bond for the building of a public road or highway is presumed to have acquainted itself with the character of the road contracted for by its principal, and the local conditions that would affect the cost of its construction, and where its bond includes payment by the contractor of labor and material to be employed or used therein, it is liable to one who has rented to the contractor a steam shovel, boiler, etc., necessary to the construction of the highway under local existing conditions.

APPEAL by Southern Surety Company from *Parker, J.*, at February Term, 1927, of MCDOWELL.

Civil action in the nature of a creditors' bill, brought under 3 C. S., 3846(v), to recover of the defendant, C. W. Lacy, road contractor, and the surety on his bond, for materials furnished and labor performed in and about the construction of a road project.

The case was referred to Hon. W. C. Ervin under the statute. Upon the coming in of the referee's report, exceptions were duly filed thereto by the Southern Surety Company, and heard before his Honor, Raymond G. Parker, judge presiding, at the February Term, 1927, McDowell Superior Court, at which time all exceptions to the referee's report were withdrawn save two, the first of which was directed against the claim of Dempster Construction Company for the rental of a steam shovel, and the second was directed against the claim of M. L. Good for the rental of a steam boiler, both the shovel and the boiler being used by the contractor in and about the construction of the road in question.

From a judgment affirming the report of the referee, in which it was held that the bond was liable for both claims, the Southern Surety Company appeals, assigning errors.

Pless, Winborne, Pless & Proctor for plaintiffs Dempster Construction Company and M. L. Good.

Ruark & Fletcher for defendant Southern Surety Company.

STACY, C. J. On 26 October, 1922, C. W. Lacy, road contractor, entered into a written agreement with the State Highway Commission to construct a section of road in McDowell County, known as Project No. 847, in which it was stipulated, among other things, that for and in consideration of the price agreed upon the contractor was "to provide and furnish all materials, machinery, implements, appliances and tools, and to perform the work and labor required to construct and complete" said road project; and to insure compliance with the terms and conditions of said "standard State Highway contract" in all respects on the part of the contractor, the State Highway Commission took from the contractor, as principal, and the Southern Surety Company, as surety, a bond in the sum of $37,690, conditioned for the faithful performance of the contract, and that the principal should "well and truly pay all and every person furnishing materials or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them, or any of them, for all such labor and material for which the contractor is liable."

It is found as a fact that "much of the roadbed was blasted through hard rock, and that the steam shovel and the boiler, used to operate the drills, etc., were necessary to the proper performance of the work of construction." The contractor rented the steam shovel from the Dempster Construction Company and the boiler from M. L. Good. The claims for both are now due and unpaid.

The sole question presented by the appeal is whether the renting of these machines to the contractor was "furnishing materials" or "performing labor" in and about the construction of said roadway within the meaning of the bond in suit. If so, it is conceded that the judgment is correct, and ought to be upheld; otherwise, not. We think the judgment must be affirmed on authority of what was said in *Scheflow v. Pierce,* 176 N. C., 91, *Town of Cornelius v. Lampton,* 189 N. C., 714, *Aderholt v. Condon, ibid.,* 748, *Plyler v. Elliott,* 191 N. C., 54, *State Prison v. Bonding Co.,* 192 N. C., 391, and *Overman v. Casualty Co., ante,* 86.

The renting of the machines in question was but the substitution of mechanical power for manual labor. *Taylor v. Connett,* 277 Fed., 945; *Bricker v. Rollins & Jarecki,* 173 Pac. (Cal.), 592; *Hansen v. Remer,* 200 N. W. (Minn.), 839; *Multnomah County v. U. S. F. and G. Co.,* 180 Pac. (Ore.), 104.

In *Miller v. American Bonding Co.,* 133 Minn., 336, a contractor's bond was held liable for the repair of tools and machinery necessarily used on the work, and for the reasonable value of the use of such tools and machinery.

In *Dawson v. Northwestern Construction Co.,* 137 Minn., 352, a surety was held liable for the rental value of horses necessarily used on the work, including the rental value and cost of repair of harness.

In *Title Guaranty and Trust Co. v. Crane Co.,* 219 U. S., 24, recovery was allowed under a contractor's bond for cartage and towage of materials.

In *U. S. Fidelity Co. v. Bartlett,* 231 U. S., 237, where the work contracted for was building a breakwater, recovery was allowed under the bond for labor at a quarry opened fifty miles away, including wages of the men who stripped the earth to get at the stone and who removed the debris, as well as the wages of carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the trucks upon which the cars moved. The claims allowed also included the wages of stablemen who fed and drove the horses used in moving the cars.

In *Illinois Surety Co. v. John Davis Co.,* 244 U. S., 376, recovery was allowed under the contractor's bond, not only for the rental of cars, trucks and other equipment used by the contractor in prosecuting his work, but also the expense of loading this equipment, and the freight paid thereon to transport it to the place where the work was done.

In *Brogan v. Nat. Surety Co.,* 246 U. S., 257, recovery against the bondsman was allowed for provisions used by the contractor in feeding his employees, where the location of the work rendered the furnishing of such board necessary.

The principle to be deduced from these and other like decisions is that such bonds are construed liberally for the protection of those who furnish labor and materials in the prosecution of public works (*Electric Co. v. Deposit Co.,* 191 N. C., 653), and it is not thought that the surety can complain at such holding, or that any hardship is imposed thereby, because in entering into the contract the surety is chargeable with notice, not only of the financial ability and integrity of the contractor, but also with notice as to whether he possesses the plant, equipment, and tools required in undertaking the particular work, or will be compelled to rent and hire the same, or some part thereof, all of which matters are factors to be considered in determining the risk, and upon which the surety fixes the premiums exacted for executing the bond. *Sherman v. Amer. Surety Co.,* 173 Pac. (Cal.), 161.

The cases of *Electric Co. v. Power Co.,* 122 N. C., 601, and *James v. Lumber Co., ibid.,* 157, are not at variance with our present decision, for in each of these cases the question involved was the purchase price of machinery, and not its rental value for use only in the particular work.

A careful perusal of the record leaves us with the impression that the judgment is correct, and that it should be upheld.

Affirmed.

STATE v. BRANT SULLIVAN, CLARENCE SULLIVAN, BRITT SULLIVAN AND WARDEN MERCER.

(Filed 18 May, 1927.)

Instructions—Intimation of Opinion—Improper Remarks—Jury—Appeal and Error—Prejudice—Statutes.

C. S., 564, prohibiting an expression of opinion by the trial judge upon the weight and credibility of the evidence, applies to such expressions made in the hearing of the jury, and *it is held* reversible error for him, in a criminal action, to direct a judgment of nonsuit in the presence of the jury, as to one of several defendants upon trial of them all for kidnapping, upon the ground that upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense.

APPEAL by defendants from *Sinclair, J.,* and a jury, at January Term, 1927, of LENOIR. New trial.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Shaw & Jones for defendants.

CLARKSON, J. Brant Sullivan, Clarence Sullivan, Britt Sullivan, and Warden Mercer were indicted for kidnapping. In *S. v. Harrison,* 145 N. C., at p. 417, the following instruction of the court below was upheld: "By kidnapping is meant the taking and carrying away of a person, forcibly or fraudulently." All were found guilty except Britt Sullivan. On the trial all the defendants plead "Not guilty." During the trial the defendants Warden Mercer, Brant (Bryant) Sullivan, and Clarence Sullivan, testified in their own behalf, and denied their guilt.

At the close of defendants' evidence, the State, in *rebuttal,* called Britt Sullivan, one of the defendants, who did not take the stand as a witness in his own defense, but had plead "Not guilty," who testified to facts in corroboration of the State's contention. The record sets forth the following: "The court (in the presence of the jury): As to Britt Sullivan, the court is of the opinion that the evidence indicates that he went there not knowing what was going to be done—and if his evidence is to be believed, that he did not coöperate with them in any respect, but endeavored to get them to desist—the court is going to direct a verdict of not guilty as to Britt Sullivan. Defendants, in apt time, objected and excepted to the foregoing statement in the presence of the jury."

C. S., 564, is as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon."

This statute has been in force since 1796.

It is argued by the State that the court below, in dealing with Britt Sullivan's testimony, qualified his statement by saying, "If his evidence is to be believed." The vice complained of was that the other defendants were on trial, and in the presence and hearing of the jury the court below accepted the credibility of the witness for the State, Britt Sullivan's version, and directed a verdict of not guilty as to him. This clearly indicated to the jury the opinion that the court below believed Britt Sullivan did not coöperate with the other defendants, but endeavored to get them to desist; therefore, the jury should believe his testimony, and convict the others. At least, it was corroborative of the State's witness, and especially forceful as coming from the camp of the other side. The expression of the court below is also susceptible of the construction that the others coöperated. Then the action of the court below spoke louder than the words—the court below directed a verdict of not guilty as to Britt Sullivan. This the court had no right to do, unless Britt Sullivan was in no way a *particeps criminis,* the court below gave credence to his testimony and directed a verdict in his favor. The able and learned judge no doubt did not at the time realize the prejudicial effect this would have against the other defendants. We know the great burdens on the courts below, and wonder at their ability to make so few errors in administering justice. After considering the matter thoroughly, we must hold it prejudicial error. The distinct separation must be observed; the courts to interpret the law, the jury to ascertain the facts. There is an impenetrable wall between the two. In matters of such moment, it would be advisable to have the jury retire.

In *S. v. Cook,* 162 N. C., at p. 588, it is said: "While the statute refers in terms to the charge, it has always been the accepted construction that it applies to any such expression of opinion by the judge in the hearing of the jury at any time during the trial."

In *Bank v. McArthur,* 168 N. C., at p. 52, it is said: "There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly by *words or conduct.* The judges should be punctilious to avoid it, and to obey the statutory injunction strictly." (Italics ours.)

We give some of the authorities holding that the court below impinged the statute:

In *McRae v. Lawrence,* 75 N. C., p. 289, "That both the witnesses were gentlemen, and that it was a pure matter of memory. That it was the duty of the defendant to make out the fact of payment," held to be error.

In *Marcom v. Adams,* 122 N. C., p. 222, a remark of the judge to defendant's counsel, "The plaintiff seems to have put you in a hole. I would be glad to help you, if I could," was objectionable.

In *S. v. Davis,* 136 N. C., p. 568: An expression by a trial judge that a witness had fully explained for an hour to the jury, and to the satisfaction of the court, certain facts, is erroneous.

In *Chance v. Ice Co.,* 166 N. C., p. 495, this Court held as error the remark of the presiding judge, "That part of the answer is stricken out, this witness is too smart."

In *Bank v. McArthur,* 168 N. C., p. 48: Remarks made by the judge, in the course of a trial involving the genuineness of signature of the endorsers of a note, in regard to plaintiff's calling upon the principal, who had not been introduced to testify, "asking the plaintiff's counsel why they did not call J. Sprunt Newton" is reversible error.

In *S. v. Rogers,* 173 N. C., p. 755, it is held: "A remark to a defendant by the trial judge, when testifying in his own behalf under indictment for cruelty to animals, to answer the questions asked him concisely, 'and not be dodging,' is an expression of opinion on the credibility of the evidence, forbidden by the statute, and constitutes reversible error, though the judge withdraws the remark and endeavors to eradicate the impression made by it."

Morris v. Kramer, 182 N. C., p. 87: In an action to recover damages for personal injury, where a release from liability is set up and relied upon, with evidence to support it, it is reversible error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard, in his own State, of such conduct; which reflected on the witness, and no effort being made on his part to remove, by his instruction or admonitions to the jury, the prejudice thus necessarily occasioned can have that effect, and a new trial before another jury will be ordered on appeal.

Greene v. Newsome, 184 N. C., p. 78: The action was prosecuted for the purpose of canceling a deed for certain property, alleged to have been executed by the defendant J. C. Newsome in fraud of his creditors. The record shows that during the cross-examination of a witness for the plaintiff the following incident occurred: "By the court: Do you know where J. C. Newsome and Tom Newsome are, and also why they are not here in court to defend this action, as they should be? Their absence is a circumstance that a fraud has been committed. A. I haven't seen either J. C. Newsome or Tom here today." This was held to be error.

In *S. v. Bryant,* 189 N. C., at p. 115, a new trial was granted—the presiding judge used the expression, "This witness has the weakest voice or the shortest memory of any witness I ever saw." *S. v. Dick,* 60 N. C., p. 440; *Withers v. Lane,* 144 N. C., 184; *S. v. Beal,* 170 N. C., 764; *S. v. Horner,* 174 N. C., 788; *S. v. Windley,* 178 N. C., 670; *S. v. Sparks,* 184 N. C., 745.

"The power of the court to withdraw incompetent evidence, and to instruct the jury not to consider it, has long been recognized in this State." *S. v. Stewart,* 189 N. C., at p. 344.

For the reason given, there must be a

New trial.

BANK OF ONSLOW v. ROWLAND LUMBER COMPANY.

(Filed 18 May, 1927.)

Mortgages — Title — Timber — Deeds and Conveyances — Extension of Period for Cutting and Removing Timber—Consideration—Payment —Tender.

A mortgage given on timber growing on lands conveys the title only to the extent of securing the note given to the mortgagee for the payment of the money borrowed thereunder, and where the timber deed provides for an extension period for the cutting and removing of the trees upon the grantee's exercising his option and paying the consideration before the termination of the first or succeeding periods, a payment or proper tender to the grantor or his successors and assigns in conformity with the provisions of the instrument secures to the grantee or those thus rightly claiming under him the continued right to cut and remove the timber for the stated period.

APPEAL by defendant from *Devin, J.,* at November Term, 1926, of ONSLOW. Reversed.

Action to recover damages for trespass by cutting and removing timber from lands owned by plaintiff.

It was agreed at the trial that on 1 February, 1925, defendant entered upon said lands and cut and removed therefrom timber of the value of $1,200.

The court having found the facts from the evidence, by consent, and being of the opinion upon said facts that defendant had no right to enter upon said lands, and to cut and remove said timber, on 1 February, 1925, rendered judgment that plaintiff recover of defendant the sum of $1,200, with interest from 1 February, 1925.

From this judgment defendant appealed to the Supreme Court, its principal assignment of error being based upon its exception to the judgment.

Varser, Lawrence, Proctor & McIntyre for plaintiff.
L. I. Moore for defendant.

CONNOR, J. The material facts upon which the determinative question involved in this appeal is presented for decision are as follows:

1. On 9 March, 1906, William Simmons and his wife, by deed duly recorded on 20 April, 1906, conveyed to Blades Lumber Company the timber on lands described in said deed.

With respect to the time within which said timber may be cut and removed from said land, the deed provides, first, that the grantee, its successors or assigns, shall have the full term of ten years from the date of the deed within which to cut and remove said timber, and second, that at the expiration of said term of ten years, said time may be extended from year to year, for an additional term of ten years, upon the request of said grantee, its successors or assigns, and upon payment to the grantor for each yearly extension of a sum equal to six per cent of the purchase price paid for said timber.

2. The defendant Rowland Lumber Company, by *mesne* conveyances, has succeeded to the rights, privileges, and property conveyed by said deed to Blades Lumber Company, and as its successor is now the owner thereof.

3. Upon the expiration of the original term of ten years within which said timber might be cut and removed, the time for such cutting and removal was extended in accordance with the provisions of said deed to 9 March, 1920.

4. Before the expiration of such extended time, to wit, on 2 February, 1920, William Simmons and his wife, for the purpose of securing the payment of their note to plaintiff Bank of Onslow, executed and delivered to said Bank of Onslow a mortgage deed, which was duly recorded on 16 February, 1920, by which they conveyed to said bank the lands on which the timber theretofore conveyed to Blades Lumber Company was standing and growing; other lands were also conveyed by said mortgage deed.

5. Thereafter, to wit, on 27 February, 1920, the defendant Rowland Lumber Company, or its predecessors in title, for the purpose of obtaining an extension of time within which to cut and remove said timber, from 9 March, 1920, to 9 March, 1923, paid to William Simmons, the mortgagor of plaintiff Bank of Onslow the sum of money required by the provisions of the deed from said William Simmons and wife to Blades Lumber Company for such extension, and took from said Simmons his receipt for said sum of money, which was duly recorded.

6. Default was made by William Simmons in the payment of his note secured in the mortgage to plaintiff, at its maturity, to wit, 1 November, 1920; thereafter an action was begun by plaintiff against said Simmons

and wife for the foreclosure of said mortgage. All the lands conveyed by said mortgage were sold under a decree rendered in said action. The lands upon which the timber in controversy in this action was located were purchased by plaintiff and conveyed to it by the commissioner's deed, dated 28 December, 1922, and recorded on 25 January, 1923. After applying the proceeds of the sale of all the lands conveyed by said mortgage to the indebtedness therein secured, there is a balance due on said indebtedness of more than $1,500, which remains unpaid.

7. On 27 February, 1923, after plaintiff had become the owner in fee of the land on which said timber is located, defendant tendered to plaintiff the sum of money required for an extension of the time within which to cut and remove the same from 9 March, 1923, to 9 March, 1926; plaintiff refused to accept said money. Defendant thereafter, on 1 February, 1925, entered upon said land and cut and removed timber therefrom of the value of $1,200.

8. From the date of the execution of the mortgage deed by William Simmons and wife to plaintiff until the conveyance of the lands described in the complaint to plaintiff by the commissioner, under decree in the action to foreclose said mortgage, no one was in the actual possession of said land; the only possession thereof was the constructive possession of the owner of the legal title to said lands; since said conveyance, plaintiff has been in the actual possession of said lands.

Upon the foregoing facts the court was of opinion that defendant had no right to enter upon said lands and to cut and remove timber therefrom on 1 February, 1925. In accordance with this opinion, and upon the admission of defendant that it had cut and removed timber from said lands, on 1 February, 1925, of the value of $1,200, judgment was rendered that plaintiff recover of defendant the sum of $1,200, with interest from 1 February, 1925. Defendant, by its assignment of error, based upon its exception to said judgment, on its appeal to this Court, presents its contention that there was error in the opinion of the court that defendant had no right to cut and remove said timber on 1 February, 1925.

It has been uniformly held by this Court that in the absence of a provision in the deed to the contrary, the sum of money required to be paid for an extension of time within which timber conveyed by a timber deed may be cut and removed from the land, after the term provided in said deed for such cutting and removal has expired, must be paid to the owner of the land at the date on which the extension is requested in accordance with the provisions of the deed. *Bennett v. Lumber Co.,* 191 N. C., 425; *Morton v. Lumber Co.,* 178 N. C., 163; *Timber Co. v. Wells,* 171 N. C., 262; *Timber Co. v. Bryan,* 171 N. C., 265. See, also, 38 C. J., 172. Such extension is not obtained by payment of the extension money to one who is not the owner of the land, on which the timber is located at the time the payment is made.

In the instant case, the court was of opinion that no extension of time for cutting and removing said timber beyond 9 March, 1920, was obtained by the payment of the extension money to William Simmons, grantor in the timber deed, on 27 February, 1920, for the reason that said Simmons, having theretofore conveyed the lands by mortgage deed to plaintiff, was not then the owner of said lands; that plaintiff, as mortgagee, was such owner.

The question presented by this appeal does not seem to have been heretofore considered or decided by this Court, or by any other court of appellate jurisdiction. This question may be stated as follows: Does the owner of timber, who holds title thereto under a deed containing the usual provisions with respect to the extension of time within which to cut and remove said timber, obtain such extension by payment of the extension money to the grantor in said timber deed, as provided therein, where said grantor, subsequent to the execution and registration of said deed, has conveyed the land on which the timber is located by a mortgage deed which was duly registered at the time such payment was made? Did defendant in this action, or its predecessor in title, obtain such extension of time from 9 March, 1920, to 9 March, 1923, by the payment of the extension money to William Simmons on 27 February, 1920, notwithstanding the fact that prior to said date the said Simmons had conveyed the land to plaintiff, by mortgage deed, which was duly recorded prior to 27 February, 1920?

The legal title to property, whether real or personal, conveyed by a mortgage deed, passes to and vests in the mortgagee, who holds the same, however, only for purposes of security. *Crews v. Crews,* 192 N. C., 679; *Moseley v. Moseley,* 192 N. C., 243; *Humphrey v. Stephens,* 191 N. C., 101; *Dameron v. Carpenter,* 190 N. C., 595; *Stevens v. Turlington,* 186 N. C., 191; *Weathersbee v. Goodwin,* 175 N. C., 234. The equitable or beneficial title remains in the mortgagor, who, as to all persons except the mortgagee, is considered the true owner of the property. With respect to the property conveyed to him as security, the mortgagee has such rights only as are required for the protection of his security, and it is for this reason that he is considered as the holder of the legal title. In *Stevens v. Turlington, supra,* it is said: "In this State mortgages are practically the same as at common law, with the exception of the mortgagor's equity of redemption and its incidents. We adhere to the doctrine that the legal title passes to the mortgagee, subject to the equitable principle that this passage of the legal title is primarily by way of security for the debt, and that for all other purposes the mortgagor is regarded as the owner of the land."

We must therefore hold that on 27 February, 1920, William Simmons, grantor in the deed under which defendant was then the owner of the timber, was the owner of the lands on which said timber was located, and that defendant was required to pay to him as such owner the money for the extension from 9 March, 1920, to 9 March, 1923, as requested by defendant, in accordance with the provisions of the timber deed, notwithstanding the said Simmons had theretofore conveyed said lands to plaintiff, as mortgagee.

Defendant, by the payment to said Simmons, on 27 February, 1920, of the extension money, in accordance with the provisions of the deed, obtained an extension of the time within which defendant had the right to cut and remove said timber from 9 March, 1920, to 9 March, 1923.

It follows, therefore, that by its tender of the extension money on 27 February, 1923, to plaintiff, who on said date was the owner in fee of the said land, defendant acquired the right to enter upon said land and to cut and remove the timber therefrom at any time between 9 March, 1923, and 9 March, 1926. Defendant's right to such extension was not defeated by the refusal of plaintiff to accept the money for the extension tendered by defendant on said date.

There was error in holding that defendant had no right to cut and remove the timber from the lands owned by plaintiff on 1 February, 1925. The judgment must therefore be

Reversed.

AMERICAN TRUST COMPANY, RECEIVER OF SECURITY SAVINGS BANK, v. W. L. JENKINS, W. D. WILKINSON, E. R. SMITH, W. H. WEBSTER ET AL.

(Filed 18 May, 1927.)

1. **Banks and Banking—Double Liability—Transfer of Shares of Stock—Registration—Notice.**

Depositors and creditors have a right to look to those whose names appear on the books of the bank as having stock therein for the amount of the statutory liability, 3 C. S., 219(a), and a person having stock issued to him in his own name, and it so appears upon the books, cannot escape such liability on the ground that in fact he held said stock as trustee for an undisclosed *cestui que trust*, and that the officers of the bank knew of the trusteeship, since notice to the officers of the bank is not notice to the depositors and creditors thereof.

2. **Same—Shares of Stock—Vendor and Purchaser—Sales—Notice.**

It is required of a person selling shares of stock of a bank to escape personal liability under the provisions of 3 C. S., 219(d), to surrender the possession of the shares to be transferred to the proper officials of the bank in order that they may be properly transferred on the books to the purchaser.

3. Same—Principal and Agent.

Where the laws under which a corporation transfers its shares of stock requires that the transfer from seller to the purchaser be in person by the seller, or authorized in writing, the purchaser as agent for the seller in this respect must conform to this requirement.

4. Same—Leaving the Certificates with the Bank for Purposes of Transfer.

In order to require of the proper officers of the bank to transfer its shares from one appearing upon its books as an owner to the purchaser, the one having authority to do so must meet every reasonable requirement of the bank, and his failure to leave with its officers the shares in question for them to make the transfer requested will not relieve the one whose name appears on the books as the owner from personal liability provided by statute.

APPEALS by plaintiff and defendants W. D. Wilkinson and W. H. Webster from *Lyon, J.*, at October Special Term, 1926, of MECKLENBURG. Judgments affirmed in appeals of defendants; error in appeal of plaintiff.

Action by receiver of an insolvent bank to recover of each of the defendants the full amount for which he is individually responsible, by reason of his statutory liability as a stockholder in said bank. 3 C. S., 219 (a).

The defendants W. D. Wilkinson, E. R. Smith, and W. H. Webster filed separate answers to the complaint, in which each denied liability upon the allegations of his further answer and defense. The issues raised thereby were tried separately, pursuant to an order of severance.

From judgments that plaintiff recover of defendant W. D. Wilkinson the sum of $1,000, and of defendant W. H. Webster the sum of $2,000, the said sums being the amounts, respectively, of the par value of the shares of stock owned by each of said defendants, as shown by the stock register of said bank, both defendants appealed; from judgment that plaintiff recover nothing of defendant E. R. Smith, plaintiff appealed.

These appeals were heard and considered together by the Supreme Court. The questions presented for decision appear in the opinion below.

Whitlock, Dockery & Shaw for plaintiff.

Taliaferro & Clarkson for defendant W. D. Wilkinson.

T. L. Kirkpatrick, J. A. Lockhart, and G. B. Watkins for defendant E. R. Smith.

Jake F. Newell for defendant W. H. Webster.

CONNOR, J. The Security Savings Bank, a corporation organized and doing business under and by virtue of the banking laws of North Carolina, with its principal office and place of business in Mecklenburg

County, was duly adjudged insolvent during the month of August, 1924; plaintiff, American Trust Company, was thereupon appointed receiver of said bank by the Superior Court of Mecklenburg County; it is now engaged in the performance of its duties as such receiver.

The assets of said Security Savings Bank, all of which have passed into the hands of the receiver, are not sufficient to pay the claims of depositors and other creditors of said bank and the expenses of the receivership; it is necessary for the receiver to collect from each of the stockholders of said bank the full amount for which he is individually responsible by reason of his statutory liability, 3 C. S., 219 (a). Some of the stockholders, upon demand of the receiver, have paid the amounts for which they are liable; this action was begun by the receiver to recover judgments against those of the stockholders who have failed or refused to pay the amounts for which they are individually responsible.

The defendants W. D. Wilkinson, E. R. Smith, and W. H. Webster filed answers to the complaint; each of said defendants admitted in his answer, or upon the record, that the receiver is entitled to recover of each of the stockholders of the Security Savings Bank an amount equal to the par value of the shares of stock in said bank owned by him, in order that he may have in hand funds with which to pay the claims of depositors and other creditors of said bank and the expenses of the receivership; each, however, denies that he was a stockholder of said bank at the time it was adjudged insolvent.

Defendant W. D. Wilkinson, in his answer, admits that the books of the Security Savings Bank show that he is the absolute owner of ten shares of the capital stock of said bank, and that a certificate for said shares was issued to him, and is now outstanding; he denies, however, that he is the owner of said shares. In his further answer and defense to plaintiff's cause of action, as set out in the complaint, he alleges that said shares of stock were transferred, on or about 16 April, 1924, by one R. L. Goode to him as trustee for the Carolina Automobile Company, in part payment of the purchase price of an automobile sold to said Goode by the said automobile company; that the active officers of said bank knew that said shares of stock were the property of the Carolina Automobile Company, and not the property of defendant; and that the certificate for said shares of stock was issued to defendant at his request, and in his name by the officers of the bank, with actual notice that said shares were held by him as trustee for said Carolina Automobile Company.

Upon the foregoing admissions in his answer, the court was of opinion that plaintiff was entitled to recover judgment upon the pleadings against defendant W. D. Wilkinson, as prayed for in the complaint, notwithstanding the facts alleged in the further answer and defense thereto. Defendant W. D. Wilkinson, upon his appeal to this Court, assigns as error the judgment rendered by the court, upon the motion of plaintiff, in accordance with its opinion as aforesaid.

It is provided by statute, with reference to corporations organized and doing business under the banking laws of this State, that "persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders, but the estate or funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living and competent to hold stock in his own name." 3 C. S., 219 (c).

In *Smathers v. Bank,* 155 N. C., 283, it was held that by reason of this statute, a person to whom a certificate for shares of the capital stock in a bank was issued, showing on its face that he held the said shares as trustee for a *cestui que trust,* also named in the certificate, is not liable personally as a stockholder in an action by the receiver of the bank to recover judgment upon the statutory liability of stockholders. It is said in the opinion: "This act is conclusive as to the nonliability of the trustee, Lewis Maddux, for the stock liability upon the shares of which his wife was the beneficial owner. There being no evidence to rebut the ownership of the stock being in Mrs. Maddux, according to the tenor of the certificate, the holding of the court that Lewis Maddux was the owner, viewed as a finding of fact, is reviewable, and considered as a conclusion of law, is erroneous." In that case the certificate was issued to "Lewis Maddux, trustee for Lauretta Maddux, his wife." It was held that Lewis Maddux was not liable personally, but that his wife, Lauretta Maddux, was liable to the receiver.

The question as to whether a person who appears upon the books of a bank to be the absolute owner of shares of stock therein, and to whom a certificate has been issued accordingly, may escape personal liability as a stockholder by showing that he holds said shares of stock as trustee for another, has not heretofore been presented to this Court for decision. However, the question has arisen in other jurisdictions upon statutes similar in their provisions to our statute. U. S. Comp. Stat., 9690, R. S., 5152.

In *Kerr v. Uhrie,* 86 Md., 72; 37 Atl., 789; 63 Am. St. Rep., 493; 38 L. R. A., 119, it was held that a person whose name appears on the books of a national bank as the absolute owner of stock in said bank is subject to liability as a stockholder, although such person holds the stock as trustee. It is said in the opinion in that case: "If persons were allowed to subscribe for stock in a national bank, or in any other corporation where a personal liability attaches, either as an attorney for an unnamed principal, as self-appointed trustee for some unnamed *cestui* *que trust,* or as attorney for an unnamed infant of tender years, and when called upon to pay the debts of the bank to the extent of the stock subscribed, could escape liability by simply declaring that they represented in some capacity those who are legally or otherwise incapacitated, the law would be a dead letter, and the creditors of these associations, which are found in great numbers in every state, would be deprived of the only means provided by law for the payment of claims."

In *Adams v. Clark* (Colo.), 85 Pac., 442, it is said: "In those jurisdictions where statutes have been enacted providing that persons holding shares as executors, administrators, conservators, guardians, or trustees shall not be subject to liability as stockholders, it is held that to protect such persons from personal liability it must appear on the books of the corporation that the holding is in such capacity."

In *Davis v. First Baptist Society,* 44 Conn., 582; Fed. Cas. No. 3633, it is said: "Creditors have a right to know who have pledged their individual liability. If trusteeship does not appear upon the books of the bank, they have the right to infer that the stockholder is personally liable. If a trustee wishes to disclose his trusteeship, there is no difficulty in giving notice upon the books of the bank. If he does not disclose his trusteeship, he is guilty of laches, for which others should not suffer. The settlement of the affairs of an insolvent bank would be rendered a matter of great labor, expense, and delay if persons who appeared upon the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock as executors, or guardians, or trustees."

In *Sherwood v. Illinois Trust and Savings Bank* (Ill.), 62 N. E., it is said: "A creditor is entitled to hold him liable as a stockholder who appears to be the legal owner of the stock, and this is true although it may be that there has been a transfer of the stock which has not been entered on the books of the corporation. Thomp. Liab. Stockh., sec. 178; 2 Mor. Priv. Corp., sec. 852. On the same principle, one who stands upon the books of the corporation as a stockholder may be proceeded against for the recovery of any sum upon the stock, although he in fact holds such stock as trustee for another."

The law is stated in 7 C. J., at page 770, as follows: "The statute provides that persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders, and this provision is held to refer not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relation, however created. But the exemption is limited to cases of express and active trusts, where there is a probability of some estate to respond to the liability; it does not apply where the bank's records show an unincumbered title in the alleged trustee." See *Flynn v. American*

Banking and Trust Co. (Me.), 69 Atl., 771; 19 L. R. A. (N. S.), 428, where it is held that one cannot avoid his statutory liability for the debts of the corporation by adding the word "trustee" to his name as it stands upon the stock book of the corporation as a stockholder therein.

All the decisions in other jurisdictions are to the effect that a person holding shares of the capital stock of a bank as trustee for another, is not relieved of statutory liability to creditors of the bank, by virtue of statutes similar to 3 C. S., 219 (c), where the stock register of the bank, or the certificates issued for said shares, fails to disclose the trusteeship. These decisions are well supported by the opinions of the several courts by which they were made. We therefore hold that no person who appears upon the records of a bank as a stockholder therein is relieved of personal liability under 3 C. S., 219 (a), by virtue of the provisions of 3 C. S., 219 (c), unless the said record, or the stock certificate issued to him, shows that he holds the said stock as trustee for a *cestui que trust* named on the record or in the certificate.

It is immaterial when the rights of depositors and creditors of the bank are involved that its officers had notice of the trusteeship. The liability imposed by statute upon stockholders of a bank is for the benefit of depositors and creditors, and not of the bank. *Smathers v. Bank,* 155 N. C., 283. Notice to the bank is not necessarily notice to depositors or creditors.

There is no error in the judgment from which defendant W. D. Wilkinson has appealed to this Court. It is affirmed.

Defendant W. H. Webster, in his answer to the complaint, denied that he was a stockholder of Security Savings Bank at the time plaintiff was appointed as receiver of said bank. Issues arising upon his further answer and defense to the cause of action set out in the complaint were submitted to the jury. Upon evidence to which there were no objections, the jury found that defendant W. H. Webster, in good faith, sold the 20 shares of the capital stock owned by him and standing in his name on the books of the bank, on and prior to 12 October, 1923, and delivered the certificate therefor to H. L. Hopkins, more than sixty days prior to the insolvency of said bank, as alleged in the answer; and that said shares of stock were not transferred on the books of the bank from defendant to said Hopkins or to his assignee. The court thereupon held as a matter of law that defendant is indebted to plaintiff in the sum of $2,000, the par value of said shares of stock. Defendant excepted to the judgment rendered upon the verdict and upon the admissions in the answer, and on the record, and upon his appeal to this Court assigns same as error.

Defendant admits that he was, on and prior to 12 October, 1923, a stockholder of Security Savings Bank, owning 20 shares of its capital stock, as shown by the records of said bank, and by the certificate issued to him therefor. He was not relieved of his statutory liability as such stockholder by the sale of such stock. He remained subject to such liability so long as such shares of stock stood in his name upon the books of the bank. He could be relieved of such liability only by a transfer of such shares to a purchaser, in accordance with the provisions of the statutes. 3 C. S., 219 (d). It is therein provided that "no person who has in good faith, and without intent to evade his liability as a stockholder, transferred his stock on the books of the corporation to any person of full age, previous to any default in the payment of any debt or liability of the corporation, shall be subject to any personal liability on account of the nonpayment of such debt or liability of the corporation, but the transferee of any stock so transferred previous to any default shall be liable for any such debt or liability of the corporation to the extent of such stock, in the same manner as if he had been such owner at the time the corporation contracted such debt or liability: *Provided,* that no transfer of the shares of stock of an insolvent State bank, made within sixty days prior to its suspension, shall operate to release or discharge the assignor thereof, but shall be prima facie evidence that such stockholder assigned the same with knowledge of the insolvency of such bank and with an intent to evade the liability thereon."

There is no error in the judgment from which defendant W. H. Webster has appealed to this Court. It is affirmed.

Defendant E. R. Smith, in his answer to the complaint, denied that he was a stockholder of Security Savings Bank at the time plaintiff was appointed receiver of said bank. Issues arising upon his further answer and defense to the cause of action set out in the complaint were submitted to the jury. The jury found from the evidence, as appears from their verdict, that defendant E. R. Smith, in good faith, sold the ten shares of the capital stock of said bank, owned by him and standing in his name upon the books of the bank, on and prior to 30 November, 1923, to one E. P. Gatling more than sixty days prior to the insolvency of the Security Savings Bank, as alleged in the answer; that the said shares of stock were not transferred on the books of the bank from said defendant to the said Gatling; that said Gatling, more than sixty days prior to the insolvency of said bank, presented the certificate for said stock to the officers of said bank and requested that said certificate be transferred on its books, but that said Gatling, after making such request, refused to leave said certificate with the officers of said bank in order that said transfer might be made.

Plaintiff moved for judgment upon the verdict, and excepted to the refusal of the court to allow said motion. The court was of opinion that upon the verdict defendant is not indebted to plaintiff by reason of liability as a stockholder, under the statute. Plaintiff excepted to the judgment rendered upon the verdict and in accordance with the opinion of the court, and upon its appeal to this Court assigns same as error.

In *Whitney v. Butler,* 118 U. S., 655; 30 L. Ed., 266, *Mr. Justice Harlan* says: "In nearly all the cases cited in the opinion of the circuit judge in support of his judgment, where the issue was between the receiver, representing the creditors, and the person standing on the register of the bank as a stockholder, it is said, generally, that the creditors of a national bank are entitled to know who, as shareholders, have pledged their individual liability as security for its debts, engagements, and contracts; that if a person *permits* his name to appear *and remain* in its outstanding certificates of stock and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made. Some of the cases hold that the seller is liable as a shareholder even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. But it will be found, upon careful examination, that in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not made by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller, in such case, is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is that the deed is considered as recorded from the time of such deposit. Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to the officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register."

This case has been frequently cited as an authority upon the questions involved, and is regarded as the leading case on this subject. See Rose's Notes, Vol. 11, page 198. In *Richmond v. Irons,* 121 U. S., 27; 30 L. Ed., 864, it is held that the rule laid down therein is not applicable where there is no proof that the certificate, with power of attorney for its transfer, was delivered to the bank, with request that it be transferred on its books.

In the instant case, it appears from the verdict that the certificate for the shares of stock sold by defendant to E. P. Gatling was not delivered or surrendered to the bank at the time its officers were requested to transfer the same on the books of the bank from the defendant to the purchaser. Without such delivery or surrender, the officers of the bank were without authority to make the transfer. It cannot be held as a matter of law, upon the facts established by the verdict herein, that defendant, or his vendee acting as his agent for that purpose, did all that he reasonably could do to effect a transfer of the stock, and that defendant was therefore relieved of his statutory liability as a stockholder in the absence of an actual transfer of his stock upon the books of the bank.

There was error in the refusal to allow plaintiff's motion for judgment upon the verdict, and also in the judgment of the court as rendered upon the verdict. The judgment is reversed; the action is remanded, that judgment may be entered in the Superior Court of Mecklenburg County upon the verdict, and upon the admissions in the answer and on the record, in accordance with this opinion.

Upon the appeals of defendants W. D. Wilkinson and W. H. Webster, the judgments are affirmed.

Upon the appeal of plaintiff there is error; the judgment is reversed, and the action remanded for new trial.

PITTSBURGH PLATE GLASS COMPANY, INC., v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 18 May, 1927.)

1. **Contracts—Principal and Surety—Buildings—Materialmen—Fraud in the Treaty.**

Where the contractor for a building to be erected provides for his payment of material used in and labor performed on the building and furnishes an indemnity bond expressly providing for the payment of such materials and labor, a materialman whose claim has remained unpaid may directly sue the surety and recover upon the bond on its promise to pay.

2. **Same—Evidence.**

Where the contract for the erection of a building provides for the payment of money, and the contractor and owner have secretly agreed that the contractor should receive as a part of his consideration certain mortgage bonds on the building contemplated, it is fraud in the treaty on the rights of the surety on the contractor's bond who has executed it without knowledge of the fact, and the materialmen whose claims are thereunder provided for, take subject to all legal defenses and inherent qualities arising out of the contract sued on.

3. **Same—Election of Remedies—Fraud in the Factum.**

Where the fraud perpetrated in the execution of a contract is in the treaty as distinguished from being in the *factum*, upon discovering the fraud the injured party may affirm the contract and sue to recover his damages by reason of the fraud, or he may elect to rescind the contract and recover at common law or in equity; or he may seek affirmative relief in a suit in equity.

4. **Same—Nonsuit—Waiver—Pleadings.**

Where the materialman sues the owner of a building to be erected, together with the contractor and the surety on his bond, and a trustee who held funds for the benefit of the parties, an agreement of nonsuit entered of record, without prejudice to plaintiff's rights against the surety will not, as a matter of law, be construed as a waiver of the right of the plaintiff to recover of the defendant surety upon issues raised by the pleadings between them.

APPEAL by defendant from *Grady, J.*, at September Term, 1926, of NEW HANOVER.

A local corporation, known as the Hotel Corporation, organized to build a hotel in the city of Wilmington, bought a lot for the site. On or about 18 September, 1923, this corporation entered into an agreement with G. L. Miller & Company, by the terms of which it was to issue to Miller & Company first mortgage bonds in the sum of $540,000, and second mortgage bonds in the sum of $75,000, secured by deeds of trust, to be held by Miller & Company as its agent and trustee, and applied to the payment of labor and material furnished for the construction of the building. The plaintiff alleged that Miller & Company agreed to complete the work and turn over the building to the Hotel Corporation free from all liens, except those of the bonds, and to pay for all material that went into the building. Miller & Company employed Walter Clark as contractor to put up the hotel. On 2 November, 1923, Walter Clark, as principal, and Fidelity and Deposit Company of Maryland, as surety, executed a bond in the sum of $418,896 to Miller & Company, as trustee representing the Hotel Corporation, conditioned as follows: "That if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same, and shall fully indemnify and save harmless the owner from all costs and damages which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise, it shall remain in full force and effect." Thereafter the plaintiff furnished Walter Clark, as contractor, upon his order, at the price of $1,230.94, certain material, which went into the building, and on 10 January, 1925, notified the defendant of its claim, and demanded payment, which was refused. On 19 March, 1925, the plaintiff filed with the Hotel Corporation an itemized statement of claim and filed in the office of the clerk of the Superior Court a lien against the hotel. It is alleged that the Hotel Corporation was at this time indebted to Walter Clark, contractor, in a sum sufficient to pay the plaintiff's claim. The contractor defaulted and became bankrupt, and Miller & Company completed the work. On 26 August, 1925, the plaintiff brought suit against the Hotel Corporation, Miller & Company, Fidelity and Deposit Company of Maryland, Walter Clark, and A. S. Williams, trustee in bankruptcy of Walter Clark. Pleadings were filed, and when the cause was heard, judgment was given, the substance of which is as follows: It appearing that a receiver has been appointed for Miller & Company, and that the parties have agreed that the cross-actions between Miller & Company and the Fidelity and Deposit Company be continued without prejudice, the plaintiff is nonsuited as to its action against the Hotel Corporation and Miller & Company. Thereupon it is ordered and adjudged that the plaintiff recover nothing by its writ against the Hotel Corporation and G. L. Miller & Company; and the lien filed by the plaintiff against the property of said Hotel Corporation, upon which the Cape Fear Hotel now stands, is hereby vacated and ordered canceled of record.

The following issues were prepared and submitted to the jury:

1. Was the execution of the guaranty bond by the Fidelity and Deposit Company of Maryland procured by false and fraudulent representation, made to it by Walter Clark, as alleged in the answer of the Fidelity and Deposit Company of Maryland? Answer:

2. If so, has the Fidelity and Deposit Company of Maryland waived the fraud and ratified said guaranty bond, by the agreement with G. L. Miller & Company, as set out in the amendment to its answer? Answer:

3. In what amount, if anything, are Walter Clark and A. S. Williams, trustee, indebted to the plaintiff for materials used in the construction of the Cape Fear Hotel? Answer:

At the conclusion of all of the evidence, the court stated that in any view of the case, and upon the admitted facts, if the jury answered the first issue "Yes," it would direct the jury to answer the third issue in the amount demanded in the complaint, which amount was agreed upon by all parties to be correct.

"Whereupon, the court withdraws issues one and two from the jury, and does now hold as a matter of law that the plaintiff, by the language of the bond (it being a beneficiary thereof, and it not being contended that plaintiff was a party to or had any notice of any fraud, and it appearing to the court that the Fidelity and Deposit Company of Maryland has not returned, or offered to return, any part of the premium on said bond), is entitled to recover against said Fidelity and Deposit Company of Maryland, regardless of any verdict that might be rendered upon issues one and two.

"Now, therefore, upon the pleadings and admitted facts, it is ordered and adjudged that the plaintiff have and recover of Walter Clark and A. S. Williams, trustee in bankruptcy of the estate of Walter Clark, and of the Fidelity and Deposit Company of Maryland the sum of $1,230.94, with interest on $611.61 from 30 October, 1924, and on $414.58 from 2 November, 1924, and on $108.75 from 13 November, 1924, and on $96 from 14 November, 1924, at the rate of 6 per cent per annum until paid, together with the costs of this action, to be taxed by the clerk, except the cost to date, incurred by the Hotel Corporation and G. E. Miller & Company."

Defendant excepted, and appealed.

Wright & Stevens and Rountree & Carr for appellant.

Bryan & Campbell, C. D. Hogue and Peacock, Dalton & Lyon for appellee.

Adams, J. It is admitted that Walter Clark is indebted to the plaintiff in the sum of $1,230.94, with interest thereon, for materials used in the construction of the Cape Fear Hotel, and that he executed and delivered to Miller & Company a contractor's bond with the Fidelity and Deposit Company of Maryland as his surety. Among the conditions of the bond is an obligation faithfully to perform the contract, to satisfy all claims and demands incurred, and to "pay all persons who have contracts directly with the principal for labor or materials." The plaintiff's contract was made immediately with Clark, the principal, and is embraced in the terms of the bond. The plaintiff, then, is manifestly one of those for whose benefit the bond was executed. A person for whose benefit a promise is made to another, though not a party to the agreement or privy to the consideration, may maintain an action upon the promise, and one who has assumed or contracted for the payment of another's debt may be sued directly by the creditor. *Rector v. Lyda,* 180 N. C., 577; *Dixon v. Horne, ibid.,* 585; *Crumpler v. Hines,* 174 N. C., 283.

Particularly is this true when it appears by stipulation or reasonable intendment that the rights and interests of the third party were contemplated and provided for in the contract. *Withers v. Poe,* 167 N. C., 372; *Supply Co. v. Lumber Co.,* 160 N. C., 428. The bond in question is not a mere contract of indemnity as in *Peacock v. Williams,* 98 N. C., 324, and in *Clark v. Bonsal,* 157 N. C., 270; for while conditioned that the principal should fully indemnify the owner against costs and damage it contains, as already indicated, the express stipulation that he should pay for labor and materials. So it is obvious that the plaintiff is one of the beneficiaries contemplated and provided for in the bond.

In its answer the defendant alleges that its execution of the bond was procured by the fraudulent representation of Miller & Company and Walter Clark; that under the contract Clark was to receive for constructing the hotel $418,896 in cash, whereas they had entered into a secret agreement by which he was to receive in part payment bonds of the face value of $75,000, and was to pay the lessee $60,000 in cash and second mortgage bonds, and La Salle, the vice-president of Miller & Company, $25,000 in first mortgage bonds. It is contended that this fraudulent representation is ground for avoiding the bond, which is made the basis of the present action.

The record discloses evidence of fraud on the part of Clark and of Miller & Company; and assuming that it may possibly be established, we are concerned with the effect of such fraud on the rights of the parties—the effect turning upon the question whether the transaction constituted fraud in the treaty or fraud in the factum. If in the factum, the contract is void; if in the treaty, it is voidable at least between the immediate parties. If the execution of a contract is procured by fraud in the treaty, the injured party, upon discovering the fraud, may affirm the contract and sue for the damage sustained by reason of the fraud, or he may elect to rescind the contract and to resist recovery either at common law or in equity, or he may seek affirmative relief by a suit in equity. The distinction between fraud in the factum and fraud in the treaty is very clearly drawn by *Brogden, J.,* in *Parker v. Thomas,* 192 N. C., 798; and tested by the rule under which the two are there classified, it is obvious that the defendant's evidence, if accepted as true, can establish nothing more than fraud in the treaty. How, then, may the plaintiff's cause of action be affected?

The fraud complained of is alleged to have been perpetrated both by the obligee and by the defendant's co-obligor, the obligee being in privity with the co-obligor (9 C. J., 23); and the plaintiff, in seeking to take advantage of the contract between these parties, takes it subject to all legal defenses and inherent equities arising out of the contract. 13 C. J., 699, sec. 799. In reference to the subject, Page says: "If the beneficiary accepts the benefits of the contract, he takes subject to its validity as between the original parties thereto, and subject to the terms and conditions of the original contract. The liability of the promisor to the beneficiary is measured by the terms of the contract between the promisor and the promisee; and the liability of the promisor cannot exceed the liability imposed upon him by such contract. . . . If C. can maintain an action upon A.'s promise, any defense which A. could invoke as against B. can be invoked against C. If A. is induced to enter into the contract by B.'s fraud, A. may set up such fraud in an action by C., at least, if A. did not contemplate action by C. in reliance upon such contract." 4 Contracts, sec. 2393. Also Williston: "Another question concerns the admissibility of certain defenses by the promisor. When sued by the third person, the promisor may rely on facts showing that the promisee could not enforce the contract. Is the third person barred because the promisee would be? It is necessary to observe some distinctions here. The foundation of any right the third person may have, whether he is a sole beneficiary or a creditor of the promisee, is the promisor's contract. Unless there is a valid contract, no rights can arise in favor of any one. Moreover, the rights of the third person, like the rights of the promisee, must be limited by the terms of the promise. If that is in terms conditional, no one can acquire any rights under it unless the condition happens. Further, if there is a contract valid at law, but subject to some equitable defense—as fraud, mistake, or failure of consideration—the defense may be set up against the third person. If the undertaking is to pay a debt or discharge a duty of the promisee, the rights of the third person can be derived only through the promisee, and whatever defense affects the latter affects the creditor." 1 Contracts, sec. 394.

The plaintiff contends that the defendant waived the fraud and ratified the contract by a compromise of the matters in controversy between the defendant and Miller & Company; but the allegations in the defendant's amended answer and those in the reply of Miller & Company are such as to preclude our holding as a legal inference that this agreement is a waiver of the alleged fraud. Not only does the defendant allege nonperformance by Miller & Company; Miller & Company deny several of the material allegations in the amended answer.

The appellant is entitled to a
New trial.

R. L. TAYLOR v. J. A. JONES CONSTRUCTION COMPANY, J. W. MARKHAM ET AL.

(Filed 18 May, 1927.)

1. **Damages — Negligence — Permanent Injury — Evidence — Mortuary Tables—Expectancy of Life—Net Amount—Appeal and Error.**

The amount of plaintiff's recovery from a negligent personal injury inflicted on him by the defendant should be confined upon supporting evidence to the present net worth of the sum of money to be ascertained by the jury for the time fixed by the mortuary table enacted into our statute, considered with the evidence as to the health of the plaintiff at the time, the mortuary tables to be considered by the jury as only evidentiary in connection with other relevant evidence, and an instruction otherwise upon these two elements of damages for their consideration is reversible error.

2. **Master and Servant—Fellow-Servant—Negligence in Selecting Servants —Evidence—Wages Paid—Appeal and Error.**

Where the plaintiff, among other things, seeks to recover damages for a personal injury on the ground of the defendant's negligence in not selecting other competent or careful employees which caused the injury in suit, evidence as to the comparative insufficiency of compensation he paid them in comparison with that paid for competent employees, is inadmissible.

3. **Master and Servant—Negligence of Fellow-Servant—Notice Actual or Constructive—Evidence.**

For a master to be held responsible in damages for his negligence in employing incompetent fellow-servants which caused the damages in an action for a personal injury to the plaintiff, an employee engaged within the scope of his employment, the conduct of the fellow-servants or specific negligent acts while engaged in their work is insufficient unless the defendant had actual or constructive notice thereof before the injury occurred, in the absence of other evidence of the master's negligence in employing them.

CIVIL ACTION, before *R. Lee Wright, Emergency Judge,* at Spring Term, 1927, of MECKLENBURG.

On 21 September, 1925, the plaintiff, a carpenter, was working for the defendant J. A. Jones Construction Company, and had been in its employ seven or eight years. Prior to 21 September, Mrs. Sallie D. Wilder, the owner of a lot in Charlotte, entered into a contract with defendant J. A. Jones Construction Company to construct a ten-story office building, with the exception of the steel frame. The contract for furnishing the steel and the erection thereof was awarded by the owner to the defendant A. J. Dietrich, and thereafter Dietrich made a contract with the defendant J. W. Markham, a contractor for steel erection, by the terms of which the said J. W. Markham should perform the work of constructing and erecting into the steel frame of the building the steel furnished by the defendant Dietrich. The steel work consisted of raising and placing long heavy steel beams in the various stories of said building.

The elements of negligence alleged by the plaintiff were:

1. That the defendant Markham, in erecting the steel, "negligently failed to provide or construct, or cause to be provided or constructed, . . . any proper temporary floor or deck which could or would have caught falling beams."

2. That the defendant Markham and his employees . . . raised said beam, negligently using a single sling or loop, which was insufficient to properly support and balance said beam and prevent it from slipping and falling from said sling or loop.

3. That said Markham and "his employees, in raising said beam, negligently failed to use a proper tag, guide, or guy line attached to said beam for the purpose of steadying and preventing said beam from slipping out of said sling or loop."

4. That while one of said beams was being hoisted the defendant Markham "and his employees negligently failed to balance said beam properly, negligently allowed it to wabble and strike against a column or lug of the building and negligently allowed said beam to become unbalanced, slip from said loop or sling, fall upon, and cause another beam to fall upon plaintiff, causing him great and permanent injuries."

5. That the defendant Markham "negligently employed, with knowledge of his incompetence, a careless and incompetent workman, who had charge of the work of raising and hoisting said beam which injured plaintiff."

The elements of negligence asserted against the defendant Jones Construction Company were "that the defendant J. A. Jones Construction Company negligently failed to construct or provide, or cause to be constructed or provided, beneath the point or points to which the said steel beam was being hoisted, and where it was being set, and above the floor where plaintiff was working, any proper temporary floor or deck, suitable to catch falling beams."

The testimony of plaintiff tended to show that on the day of his injury he was building, or assisting in building, a form or casing, and the steel beams referred to were being raised, hoisted and set above his head, and that there was no protective floor or decking above him to safeguard the falling beams; that at the time of his injury the defendant Markham was using a single grass rope sling, with a loop in the center and a hook for the purpose of raising the beams and setting them in place. There was further evidence tending to show that the employees of the defendant Jones Construction Company had been warned that steel workers were working above them, and that there was no flooring there, and to stay out from under them. There was further testimony tending to show that the superintendent of the construction work for the defendant J. A. Jones Company had complained about the absence of a protective flooring or decking, and that the architect had instructed the defendant Markham to install this flooring or decking for the protection of laborers who were working under the employees of the defendant Markham while they were engaged in erecting the steel. There was further evidence that other objects had fallen from upper floors from time to time, such as rivets and bolts. There was further evidence to the effect that the falling beam inflicted serious and permanent injuries upon the plaintiff.

The issues and answers of the jury thereto were as follows:

1. Was the plaintiff injured by reason of the negligence of the defendant J. W. Markham, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff injured by reason of the negligence of the defendant J. A. Jones Construction Company, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff contribute to his own injury, as alleged in the answer? Answer: No.

4. What amount, if any, is plaintiff entitled to recover against the defendants, or either of them. Answer: $22,875.

5. Was the negligence of the defendant J. W. Markham primary, and that of the J. A. Jones Construction Company secondary? Answer: Yes.

6. Was the negligence of the defendant J. A. Jones Construction Company primary and that of J. W. Markham secondary? Answer: No.

Judgment was entered upon the verdict, and both defendants appealed.

Brenizer & Scholl for plaintiff.
J. Laurence Jones for Jones Construction Company.
James A. Lockhart for J. W. Markham.

BROGDEN, J. On the issue of damages, the court charged the jury as follows: "The plaintiff, if entitled to recover, is entitled to have a reasonable compensation, if he is entitled to recover at all, he is entitled to recover for the loss of both bodily and mental powers, and for actual suffering, both of body and mind, which are the immediate and necessary consequences of the injury. And it is for you, gentlemen of the jury, to say, under all the circumstances, how much—what is a reasonable and fair sum which the defendants should pay the plaintiff by way of compensation for the injuries he has sustained. The age of the plaintiff, his occupation, the nature and extent of his ability to work now, as compared with his ability to work before the injury, his earning capacity at the time of the injury, as compared with his earning capacity at this time, or his earning capacity for the future, are all matters for your consideration, and it is for you to say what amount, if any, the plaintiff is entitled to recover. Now, the court charges you that the evidence is that the plaintiff was about 40 years of age at the time of his injury, and according to the mortuary table, as laid down by the law, he is supposed to live 28 years longer, under the law—not that he will live that long, because he might not live but a very short time, still, he may live longer than 28 years longer, but the law fixes the limit that he is supposed to live in law as 28 years from the time of his injury, and that is given for the purpose to enable juries to estimate the damages that a person is entitled to recover for the negligence of another person. Now, you have the right to take into consideration, in passing on the question of damages, his health before and his health now, whether he is permanently injured, or whether he was just temporarily injured. The court charges you that if you find that the plaintiff was permanently injured, then he is entitled to recover more damages than if he had only been temporarily injured, or if he were only suffering from a superficial wound. If you find from the greater weight of the evidence that the plaintiff is permanently injured, then you would have the right to take into consideration the suffering he has sustained, his doctor bills, his earning capacity, and his ability to perform labor in the future, because, if he is entitled to recover at all, he is entitled to recover for that period of time that he is disabled to work, or that his earning capacity has been decreased. Now, these are matters for you, and it is for you to say whether he is entitled to recover the sum of $50,000, or a smaller sum. You don't have to give him $50,000 unless you want to. You may give a smaller amount, and that is matter entirely in your hands to say how much."

Both defendants excepted to the foregoing charge.

There are two fatal defects in this instruction:

1. The charge is defective because it fails to limit the damage which may accrue in the future by virtue of permanent injury to the present cash value or present worth thereof.

The whole subject has been critically examined and the authorities assembled by *Stacy, C. J.*, in *Shipp v. Stage Lines*, 192 N. C., 475, and we deem it unnecessary to multiply authorities. Quoting from *Murphy v. Lumber Co.*, 186 N. C., 746, the *Chief Justice* said: "Defendant's position in regard to limiting the damages, if any, which may accrue in the future to the present cash value or present worth of such damages is undoubtedly the correct one, for if the jury assess any prospective damages, the plaintiff is to be paid now, in advance, for future losses. The sum fixed by the jury should be such as fairly compensates the plaintiff for injuries suffered in the past and those likely to occur in the future.

The verdict should be rendered on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective."

2. The charge also contains this language: "But the law fixes the limit that he is supposed to live in law as 28 years from the time of his injury, and that is given for the purpose to enable juries to estimate the damages that a person is entitled to recover for the negligence of another person."

It is true that the learned trial judge told the jury that the plaintiff might or might not live 28 years, but immediately following that instruction he gave the positive charge above set out. As we construe it, the effect of this positive declaration was to instruct the jury that they were to consider plaintiff's expectancy as 28 years, for the purpose of estimating damages flowing from the injury alleged. In the language of *Hoke, J.,* in *Sledge v. Lumber Co.,* 140 N. C., 459: "The error here consists in making the mortuary tables conclusive as to the plaintiff's expectancy; whereas, by the very language of the statute, they are only evidential to be considered with all other testimony relevant to the issue." *Speight v. R. R.,* 161 N. C., 80; *Odom v. Lumber Co.,* 173 N. C., 134.

The defendant Markham excepted to the following testimony: "(Q.) Don't you know furthermore that Mr. Markham paid very low scale wages?" "(A.) He was paying the regular scale. He was paying one dollar an hour." The record states that this evidence was only admitted to show that incompetent men were employed by Markham. "(Q.) Don't you know that D. L. Sloan was working on that job opposite Kale at fifty cents an hour, and that he was comparatively a green hand?" "(A.) Luke had had two years experience." The evident purpose of this testimony was to establish the negligence of Markham in failing to employ competent workmen, but we fail to see how the compensation paid a workman, or that he was being paid according to the regular scale, or any other scale, is any evidence of reputation for carelessness in performing his work. In *Walters v. Lumber Co.,* 163 N. C., 536, this Court quotes with approval the following rule as to establishing the incompetency of an employee: "The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency, and bringing them home to the knowledge of the master or company; or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. But such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of. So it is proper, when repeated acts of incompetency of a certain character are shown on the part of the servant, to leave it to the jury to determine whether they did come to the knowledge of the master, or would have come to his knowledge if he had exercised ordinary care." *Walters v. Lumber Co.,* 165 N. C., 388; *Michaux v. Lassiter,* 188 N. C., 132.

There are other grave exceptions in the record, meriting close examination and scrutiny, but, as we are compelled to send the case back for a new trial for the error specified, we deem it unnecessary to discuss the other exceptions for two reasons: first, because they may not occur in a subsequent trial; second, in discussing a case of this importance, where a new trial must be awarded, it is practically impossible to prevent employing language in the opinion which may result in advantage to one or the other of the litigants. Suffice it to say that our decision is confined solely and exclusively to the points discussed in this opinion.

New trial.

D. D. EDWARDS v. CLEVELAND MILL AND POWER COMPANY, A CORPORATION.

(Filed 18 May, 1927.)

1. **Bailment—Warehousemen—Act of God—Fires—Insurance—Damages.**

Where a milling company has received cotton for storage with each bale marked for identification, and thus mentioned in its warehouse receipt, and cotton in the warehouse, including that of the plaintiff, has been destroyed by fire resulting from lightning or other causes not within the control of the defendant, and the defendant has collected a part of the value of the plaintiff's cotton thus destroyed under a blanket policy of fire insurance: *Held,* a retention of the insurance money is a wrongful conversion of the plaintiff's property, and he may recover the amount thereof unaffected by the fact that the defendant had substituted the bales destroyed with cotton of the same grade, and that the price of cotton had declined from the market value at the time of the fire.

2. **Same—Actions—Cotton.**

One who stores cotton upon a consideration in the warehouse of another, which the warehouseman had insured, and the cotton has been destroyed by the act of God and not through any negligence on the part of the latter, the one who stored the cotton acquires rights under the policy of insurance against the warehouseman, and he may recover against the warehouseman the amount paid him by the insurance company.

3. **Same—Liability of Warehouseman as Insurer—Policies—Contracts.**

Where a cotton storage warehouse contract identifies the particular bales stored with it, and by its contract agrees to deliver them subject to storage charges: *Held,* by interpretation of the contract the warehouseman was obligated to return the identical cotton and not an equal number of bales of the same quality, and where the cotton has been destroyed by the act of God, etc., or a cause beyond the warehouseman's control, the plaintiff in his action for conversion may recover the market value of his cotton, defendant having spun up the cotton, and the question of substitution by other cotton; that the cotton was fungible has no application.

4. Same—Evidence—Questions for Jury.

Where the evidence is conflicting as to whether the plaintiff in his action of conversion had agreed to accept cotton of the same quality, etc., as that destroyed when in storage in defendant's warehouse by fire set out by lightning, etc., instead of the identical bales agreed upon in the warehouse contract, an issue arises thereby for the jury to determine.

APPEAL by plaintiff from *Harwood, J.*, and a jury, at November Term, 1926, of CLEVELAND. New trial.

This is an action of plaintiff against defendant for the conversion of ten bales of cotton, weighing 5,730 pounds at 30 cents a pound. Defendant had certain warehouses, and on 2 January, 1923, plaintiff and defendant entered into a storage agreement to store 10 bales of cotton until 1 September, 1923, 25 cents per bale per month to be paid for storage. The storage receipt set forth the weight and number of each bale delivered to defendant. The cotton, when put in the warehouse, was marked so that it could be identified. Plaintiff, under this agreement, placed the cotton in defendant's warehouse, where was stored, along with plaintiff's cotton, some 94 bales of other cotton, making 104 bales in all. The warehouse was struck by lightning about 30 August, 1924, practically all of the bales of cotton were burned over and the tags burned off, so it was impossible to identify the plaintiff's cotton.

It was admitted by defendant that for its own benefit and protection plaintiff's cotton was insured, and after the fire the insurance company adjusted the damage with the defendant. The loss was adjusted by the allowance to defendant an average of 82 pounds a bale at 30 cents a pound, including plaintiff's cotton. Within two months after the fire, the defendant converted the balance of the unburned cotton of plaintiff to its own use by spinning it up. Defendant contends it then set apart for the plaintiff, in lieu of the cotton which had been burned, cotton of the same grade, quality and quantity, which cotton so set aside has remained in the warehouse of the defendant since said fire, and now remains there subject to the order and disposition of the plaintiff.

The burned cotton was wet, and it took about two months after the fire for defendant to spin it up. Plaintiff had other cotton stored which he removed about October, 1925, except the quantity of cotton which the defendant had provided to take the place of the ten bales which were burned. There was also due plaintiff in settlement on other cotton, difference between 23 bales as stored and 23 bales delivered, 339 pounds, for which due bill was given plaintiff for 339 pounds good middling cotton, to be delivered to him instead of his original cotton.

Defendant had a blanket insurance policy, which covered all the cotton in the room where the fire was, including plaintiff's cotton. Defendant collected the insurance on plaintiff's cotton and converted to its own use the remainder of the ten bales that was not burned by spinning it up.

In substance, the defendant set up the plea that by agreement with the plaintiff certain cotton was substituted for the balance of the ten bales which were not burned—same kind, quantity and quality. This was denied by plaintiff. T. S. Morrison, a witness for defendant, who was in charge of the warehouse, testified in part: "I did substitute and he was satisfied." Defendant contends that at all times since the fire he has had and now has, subject to the demand of plaintiff, on hand cotton equal in amount, in grade and quality. There was a verdict and judgment for defendant that it was not indebted to plaintiff. The plaintiff made numerous exceptions and assignments of error, and appealed to the Supreme Court.

Other necessary facts will be set forth in the opinion.

B. T. Falls for plaintiff.
Ryburn & Hoey for defendant.

CLARKSON, J. The only necessary assignment of error for the determination of the case is to the charge of the court below, as follows: "If you shall find from the evidence that the plaintiff had stored in the warehouse of the defendant ten bales of cotton, and that during the period of such storage on or about 30 August, 1924, a fire occurred through no negligence of the defendant and without any fault of the defendant, and that the ten bales of cotton belonging to the plaintiff, along with ninety-four other bales of cotton stored in the warehouse, were burned over, the tags on the bales were burned off and any other and all other marks by which the bales of cotton could be identified as to the identical bales deposited by the plaintiff with the defendant for storage, so that there was no means of identification, or of a separation of the cotton as to the identical bales of cotton of the plaintiff from the other cotton in the warehouse, you are charged that the obligation resting on the defendant would be to deliver to the plaintiff, if you should find from the evidence that the defendant was unable to identify the bales of cotton delivered by the plaintiff—the defendant could discharge itself of the liability—by delivering to the plaintiff the same number of bales of cotton of similar grade and value, that is to say, that if the tags and markings of the bales of cotton were destroyed by means over which the defendant had no control as by fire caused by lightning, and the tags and marks by which he could identify the cotton were removed without any fault of the defendant, the defendant would not be called upon to do an impossible thing, and if you should find from the evidence that the defendant could not identify the bales of cotton that belonged to the plaintiff, then the defendant could discharge its obligation and liability by having on hand and keeping on hand, and by tendering to or delivering to the plaintiff other bales of cotton in lieu of the bales that had been burned over, and if you shall find from the evidence that the defendant had on hand and kept on hand and had on hand at the time this suit was instituted, and still has on hand, ten bales of cotton of the kind and character and the grade and value of the ten bales of cotton deposited in storage by the plaintiff, you will answer the issue that I am submitting to you, 'Nothing.' The issue is as follows: 'In what amount, if anything, is the defendant indebted to the plaintiff?' " The jury answered "Nothing." This assignment of error must be sustained and a new trial granted.

It is admitted by plaintiff that he "did not allege that the cotton was burned by the negligence of the defendant or that the fire was caused by the defendant's negligence."

In 40 Cyc., p. 429, it is said: "A warehouseman is not liable as an insurer of the goods unless he makes himself so by the terms of his contract nor for loss of or injury to the goods due to an act of God or of the public enemy, nor for losses due to inherent defects in the goods or other causes not due to negligence on his part. He is required to exercise ordinary care in the custody of the goods, by which is meant that degree of care which ordinarily prudent warehousemen are accustomed to exercise in regard to similar goods under like circumstances." Again, in the same authority, on p. 431, it is stated: "In the absence of a special contract, a warehouseman is not liable for loss by fire which occurs without his fault or neglect." *Trouser Co. v. R. R.,* 139 N. C., 382; *Sawyer v. Wilkinson,* 166 N. C., 497; *Beck v. Wilkins,* 179 N. C., p. 231, Annotated in 9 A. L. R., p. 554; *Sams v. Cochran,* 188 N. C., 731; *Morgan v. Bank,* 190 N. C., 209.

It is admitted by defendant that for its own benefit and protection it insured all of the cotton in the warehouse, including plaintiff's cotton. It received the insurance on 82 pounds per bale for 10 bales of plaintiff's cotton at 30 cents a pound and used the remainder—spun it up within two months after the fire.

In *Bank v. Assurance Co.,* 188 N. C., at p. 753, citing many authorities, it is held: "Numerous decisions have established the principle, in this jurisdiction at least, that ordinarily the beneficiaries of an indemnity contract may maintain an action on said contract, though not named therein, when it appears by express stipulation, or by fair and reasonable intendment, that their rights and interests were in the contemplation of the parties and were being provided for at the time of the making of the contract."

In *Thayer v. Thayer,* 189 N. C., p. 508, 39 A. L. R., 434, it was said: "The suit is properly brought. We said in *Parlier v. Parlier,* 186 N. C., 503, 119, S. E., 898, 'We deduce from the authorities that it is well settled that, where a contract between two parties is made for the benefit of a third, the latter may sue thereon and recover, although not strictly a party or privy to the contract.' *Bank v. Assurance Co.,* 188 N. C., 753, 125 S. E., 631." *Schofield v. Bacon,* 191 N. C., at p. 255.

The principle applicable here is laid down in *Farmers Ginnery Mfg. Co. v. Thrasher* and others, 140 Ga., p. 669, 79 S. E., 474: "If the warehouseman insures goods for his customers, and collects money from the insurer for the loss of the goods, he will hold the fund so collected for the benefit of the insured customers, or those who may have succeeded to their rights, subject to legitimate charges. . . . If at the time of the fire there be on storage goods of customers, some of which are insured and others not, and some of them, though not destroyed, are damaged and rendered incapable of identification, and in such condition they are sold by the warehouseman, the fund thus derived from the sale of the salvage will be held by the warehouseman for the benefit of all the owners of the goods, whether they be included among the insured or uninsured class." See opinion by *Lumpkin, J.,* in same case, 144 Ga., p. 598; *Boyd v. McKee et al.,* 99 Va., p. 72; 37 S. E., p. 810; 27 R. C. L., p. 980, par. 37.

"Where a warehouseman does so insure the goods he acts as agent for the owners, and it is immaterial that the owners do not in fact know of the insurance until after the loss; a ratification or adoption of the contract of insurance by such owners is necessary, and may be made when they are informed of the insurance after the loss." *Broussard v. South Texas Rice Co.* (103 Texas, 535), 26 A. & E. Anno. Cases, at p. 145, citing numerous authorities. *Southern Cold Storage and Produce Co. v. Dechman & Co.* (Texas), 73 So. Western Reports, p. 545.

The cotton delivered by plaintiff to defendant the storage receipt set forth the weight of each bale and number. The storage contract showed the same property delivered for storage was to be redelivered to owner.

In the present case it is admitted that the defendant collected from the insurance company 30 cents a pound average 82 pounds a bale on 10 bales of plaintiff's cotton—820 pounds. Defendant is liable to plaintiff for the amount collected. The total 10 bales weighed 5,730 pounds;

from this must be deducted 820 pounds for which the insurance company paid defendant for the burned cotton of plaintiff. The balance 4,910 pounds, from defendant's testimony, was converted by it—spun up, within two months after the fire. Plaintiff is entitled to the fair and reasonable market price on the 4,910 pounds at the time it was used and converted by the defendant. 26 R. C. L., p. 1147, par. 61 and 63. Since the fire cotton has gone down in price. Defendant, in substance, sets up the plea that after the fire, by agreement with the plaintiff, the defendant was to substitute the same number of pounds of cotton not burned of the same kind and quality, and is now ready, able and willing to carry out this agreement. This is denied by plaintiff. This disputed fact must be determined by a jury. Such an agreement, if established, is valid. *Beck v. Wilkins,* 186 N. C., p. 210.

Cotton is not fungible goods in bales with numbers marked on each bale and the weight of each bale ascertained. The cotton in this case was not so treated by the storage contract, and a reasonable interpretation of the contract is that the same or identical cotton delivered was to be returned, and not an equal number of bales in kind. Usage and custom cannot take the place of a contract. *R. R. v. Fertilizer Co.,* 188 N. C., at p. 140. "By 'fungible' goods are meant goods any unit of which is, from its nature or by mercantile custom, treated as the equivalent of any other unit." 27 R. C. L., at p. 977, sec. 35. Although the identification of the ten bales of cotton may have been destroyed without any negligence on defendant's part, by the act of God—lightning—yet defendant admitted that it received pay from the insurance company for 820 pounds of plaintiff's cotton, at 30 cents a pound, therefore it is liable to plaintiff for the amount so received. The remainder was converted by defendant—spun up—within two months after the fire. It is, therefore, liable for the conversion of the remainder, the reasonable or fair market price at the time it was used by it, unless it can establish the alleged agreement with plaintiff to substitute cotton of equal amount, kind and quality. The 339 pounds of cotton defendant admitted it had, the difference between 23 other bales placed on storage and that delivered, the record shows that plaintiff during the trial withdrew the claim for pay for same, 339 pounds at 30 cents a pound—$101.70, the value of this cotton. No demand had been made by plaintiff for delivery of the cotton under the terms of the due bill.

For the reasons given, there must be a

New trial.

STATE v. ROBERT RIDINGS AND ZONA HOWELL.

(Filed 18 May, 1927.)

1. **Criminal Law—Evidence—Verdict—Judgments.**

   Where the indictment charges two criminal offenses and there is evidence only as to one, a judgment on a verdict of guilty will be sustained.

2. **Criminal Law—Character—Evidence—Remarks of Counsel — Appeal and Error—Instructions—New Trials.**

   Where the character of the defendant is not put in issue, and no evidence on the point is introduced, his character necessarily stands indifferent.

APPEAL by defendants from *Webb, J.*, at September Term, 1926, of POLK. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

M. L. Edwards, S. P. Dunagan and C. O. Ridings for defendants.

PER CURIAM. The bill of indictment contains two counts. In the first the defendants are charged with fornication and adultery, and in the second with prostitution. The jury returned a verdict of guilty on both counts. Judgment was pronounced and the defendants appealed.

The evidence is sufficient to sustain the conviction upon the first count even if it is not satisfactory as to the second. When an indictment contains two or more counts and there is a defect as to one by reason of lack of evidence a verdict on the count in reference to which competent evidence was offered will support the judgment. *S. v. Toole,* 106 N. C., 736; *S. v. Holder,* 133 N. C., 710.

The defendants offered no evidence, but argued that their character was good. In closing the argument the solicitor remarked that no evidence as to their character had been introduced and the defendants excepted. We do not say that the solicitor's remark was improper. In *S. v. Knotts,* 168 N. C., 173, 190, it is said: "The characters of defendants were not involved, as they did not take the stand as witnesses in their own behalf, nor was there any evidence on that subject. It was said in *S. v. O'Neal,* 29 N. C., 251: 'The rule is then established that no deduction results in law unfavorable or favorable to the character of an individual charged by an indictment from the fact that he has introduced no evidence to show he is a person of good character. The character, not appearing either good or bad, necessarily stands indifferent.'

See, also, *S. v. Danner,* 54 Ala., 127; *S. v. Spurling,* 118 N. C., 1250; *S. v. Castle,* 133 N. C., 769. The refusal to instruct that the law presumed defendants were men of good character was therefore correct."

His Honor, however, answered the defendants' objection by saying, "The law presumes the defendants to be of good character."

The other exceptions require no discussion.

No error.

STATE v. COS SMITH AND BURDELL LITTLEJOHN.

(Filed 18 May, 1927.)

(See *S. v. Ridings, ante,* 786.)

APPEAL by defendants from *Webb, J.,* at September Term, 1926, of POLK. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

M. L. Edwards, S. P. Dunagan and C. O. Ridings for defendants.

PER CURIAM. The defendants were indicted for the offenses charged against Robert Ridings and Zona Howell, *ante,* 786, and were tried and convicted at the same time. The exceptions in the two cases are the same, and the disposition of this appeal is governed by the opinion in the other case. We find

No error.

R. J. BOLLING v. M. S. BARBEE ET AL.

(Filed 25 May, 1927.)

1. **Wills—Codicils—Intent of Testator—Interpretation.**

   A codicil will be construed in its relation to the will to give effect to the intention of the testator as to changes made in the latter, and in this respect the will and the codicil will be construed together.

2. **Same—Estates—Contingent Remainders—Vested Interests.**

   A devise of lands to testator's wife for life, or until she may remarry, with limitation over to testator's named daughters, also for life or until marriage, with further limitation over that the lands be then divided among all the testator's children that may be living at the falling in of the particular estate, creates a contingent remainder in the ulterior takers, the children of the testator living to take effect at the time of the falling in of the precedent estates; but where, by codicil, the testator provides for a division equally among all of his children without indicating otherwise: *Held*, the codicil will be construed as an amended intention "of the testator, and any child living at the death of the testator will take a vested interest in the lands so devised, subject to the extent of such interest which may be disposed of by will or deed.

CIVIL ACTION, heard by *Devin, J.,* at Third March Term, 1927, of WAKE, upon an agreed statement of facts.

Madison Barbee, a resident of Wake County, died in the year 1913, leaving a last will and testament. At the date of the original will he had two unmarried daughters, Effie Barbee and Fannie Barbee. Fannie Barbee afterwards married the plaintiff, R. J. Bolling, and Effie married Coy Farmer. Both Effie Barbee and Fannie Barbee married prior to the date of the codicil to said will. The testator, Madison Barbee, died in 1913, and Fannie Bolling, wife of plaintiff, died in the same year, subsequent to the death of her father, leaving a last will and testament, in which she devised to her husband, R. J. Bolling, the plaintiff, all her property, including "all my right, title, interest, and estate in, of, and to the lands and property of my deceased father, Madison Barbee." Delaney Frances Barbee, widow of the testator, died in October, 1924. On 6 December, 1906, after the date of the will, the testator conveyed 40 acres of land to his son, Edgar P. Barbee.

At the time of his death the testator left him surviving his wife, Delaney Frances Barbee, and six children, to wit, Edgar P. Barbee, C. W. Barbee, M. S. Barbee, Fannie Bolling, Bettie Moon, and Effie Farmer.

On 11 January, 1927, the plaintiff brought an action against all the other devisees named in the will of Madison Barbee for partition of approximately 180 acres of land owned by the testator at the time of his death. Plaintiff Bolling claimed under the will of his wife, Fannie Bolling, a one-fifth undivided interest in said land.

The will of Madison Barbee and the codicil thereto is as follows:

"I, Madison Barbee, of the county of Wake and State of North Carolina, being of sound mind and memory, but recognizing the uncertainty of human life, do make, declare, publish, and ordain this to be my last will and testament in manner and form following, hereby revoking any and all other wills and testaments heretofore by me made.

"Item One: I desire for my body a decent burial according to the wishes of my wife, if she then be living; if not, of my children.

"Item Two: I desire my executor hereinafter named to pay all my just debts, to whomsoever owing.

"Item Three: I give, devise, and bequeath to my beloved wife, Delaney Frances Barbee, for and during the term of her natural life or during her widowhood, all of my property, both real and personal, wherever the same may be situated, to be used for her comfortable support and maintenance.

"Item Four: I desire at the death or marriage of my wife, Delaney Frances Barbee, should any of my daughters at that time be unmarried (that is, never have been married), to have and to hold all my property for their support and maintenance during their natural life or until their marriage.

"Item Five: I desire that at the death or marriage of my wife, Delaney Frances Barbee, and at the marriage or death of all my unmarried daughters, that all my property, both real and personal, wherever the same may be situated, be equally divided between my children that may be living at that time, or their heirs.

"Item Six: I hereby name, constitute, and appoint my beloved and trusty son, Charles William Barbee, executor of this my last will and testament.

"Witness my hand and seal, this ...... day of May, A.D. 1903."

Codicil to will of Madison Barbee, of 4 May, 1903: "I, Madison Barbee, being in sound mind and memory, but feeble in health, do hereby make the following changes in Item 5, viz.: That, in the division of my real estate, that the proceeds of said real estate be equally divided among all my children, except Edgar P. Barbee, who is not to have any, he having had his share already; and in Item Six, I change for my executors, my sons, M. S. and Edg. P. Barbee, instead of Charles W. Barbee (owing to ill-convenience).

"Witness my hand and seal, this 28 July, 1913."

Judgment was rendered in favor of the plaintiff "that Fannie Barbee Bolling, deceased, a daughter of said Madison Barbee, was the owner of a vested remainder of a one-fifth undivided interest in the estate of said Madison Barbee, and that she, by her last will and testament, devised the same to the plaintiff. . . . That the said R. J. Bolling is the owner and entitled to possession of a one-fifth undivided interest in the estate of said Madison Barbee, deceased."

From the foregoing judgment the defendants appeal.

Percy J. Olive, John W. Hinsdale, and McLendon & Hedrick for plaintiff.

Smith & Joyner for defendants.

BROGDEN, J. The plaintiff claims a one-fifth undivided interest in the land of the testator, Madison Barbee, by virtue of the fact that his wife, Fannie Barbee Bolling, took a vested remainder under said will, which she devised by last will and testament to him.

The defendants contend that Fannie Barbee Bolling took only a contingent remainder in the land of Madison Barbee by virtue of the fact that there was a preceding life estate to the widow of the testator, and that, as Fannie Barbee Bolling died prior to the death of the life tenant, her interest in the property did not vest, and therefore her will devising the land to her husband was a nullity.

The original will, dated May, 1903, doubtless created contingent remainders only, but the codicil to the will, dated 28 July, 1913, must be fitted to the original will and construed as a part thereof. Thus, in *Darden v. Matthews,* 173 N. C., 186, the Court declares: "A codicil is a part of a will, but with the peculiar function annexed of expressing the testator's after-thought or amended intention. It should be construed with the will itself, and the two should be dealt with as one instrument." It appears from the record that at the time the original will was made the testator had two unmarried daughters, to wit, Fannie and Effie, but that these daughters had married several years prior to the date of the codicil. In the original will, in items 4 and 5 thereof, it is apparent that the testator intended to provide for his wife and his unmarried daughters until their death or marriage; but, upon the marriage of these daughters, a different situation arose. Thereupon, in 1913, the codicil was made, "expressing the testator's after-thought or amended intention." It will be observed that while the codicil refers in specific terms exclusively to item 5 of the original will that the testator at the same time expresses his intention to make changes "in the division of my real estate." This language is broad enough to apply to the entire division of the whole estate. The last utterance of the Court upon the question is by *Justice Adams* in *Jessup v. Nixon, ante,* 640, quoting the principle as stated in *Mercer v. Downs,* 191 N. C., 203: "Indeed, the prevailing rule seems to be that if an estate is given by will to the survivors of a class, to take effect on the death of testator, the word 'survivors' means those living at the death of testator; but if a particular estate is given and the remainder is given to the then survivors of a class, the word 'survivors' means those surviving at the termination of the particular estate." The opinion then proceeds: "This statement accords with the general rule that words of survivorship in a will, particularly when used in connection with a general gift, refer to the death of the testator as the time at which the survivorship will be determined, unless it is made to appear that the testator intended to refer to a time after his death; but when the gift to the survivors is preceded by a particular estate for life or years, words of survivorship, in the absence of anything indicating a contrary intention usually refer to the termination of the particular estate." When the codicil is fitted into the original will, and the language of the original will, totally repugnant to the codicil, eliminated, there would be no words of survivorship in this will, and the principle announced in *Williams v. Sasser,* 191 N. C., 453, and that line of cases would govern this case.

In *Jessup v. Nixon, supra,* it was held that if the devise to the survivors was preceded by a particular estate for life or years, words of survivorship, "*in the absence of anything indicating a contrary intention,* usually refer to the termination of the particular estate." In our case the codicil itself indicates an "amended intention" to the effect that the words of survivorship should not refer to the termination of the particular estate, but rather to the death of the testator. This "amended intention" finds strong support in the fact that after the original will was made and before the codicil was executed, the testator had conveyed to one of his children, to wit, Edgar P. Barbee, 40 acres of land, and thereafter in the codicil excluded him from participation in the estate by reason of the fact that he had already made this conveyance. We therefore hold that Fannie Bolling took a vested remainder in the estate of her father, Madison Barbee, and that the plaintiff, under and by virtue of the terms of her will, succeeds to her rights. *Power Co. v. Haywood,* 186 N. C., 313; *Williams v. Sasser,* 191 N. C., 453; *Jessup v. Nixon, ante,* 640.

Affirmed.

ZEB VANCE NORMAN, TRUSTEE, AND THE BRANCH BANKING AND TRUST COMPANY, RECEIVER OF THE UNITED COMMERCIAL BANK, v. C. V. W. AUSBON, CLERK OF THE SUPERIOR COURT OF WASHINGTON COUNTY.

(Filed 25 May, 1927.)

1. **Deeds and Conveyances—Mortgages—Probate—Registration—Clerks of Court—Liens—Statutes.**

Where the clerk of the Superior Court is the grantee in a mortgage on lands, his passing upon the sufficiency of the probate before a notary public is a judicial act which the statute forbids, and cannot have the effect of giving his subsequent registration of the instrument priority of lien over a subsequent mortgage, properly probated and prior registered. C. S., 3305.

2. **Same—Statutes—Courts—Legislative Powers.**

The requirements of our statute as to certain other officials who shall pass upon the sufficiency of probate of mortgages when the clerk of the court is a mortgagee, in order to give priority of lien over those subsequently registered, must be observed in order for a valid registration of the instrument, it being a matter referred to the legislative branch of the Government, with which the courts may not interfere. C. S., 3305, 939 (3), 3929, 3293, 3309.

APPEAL by plaintiff from *Nunn, J.,* at April Term, 1927, of WASHINGTON.

Zeb Vance Norman for plaintiffs.
Van B. Martin for defendant.

ADAMS, J. This was a controversy without action, submitted under C. S., 626, *et seq.* On 8 October, 1924, S. D. Davis and his wife executed to the defendant a mortgage deed for a tract of land in Washington County, known as the Abram Newberry Farm, to secure a note in the sum of $2,820, due on 1 January, 1925. The acknowledgment of the makers was taken on 9 October, 1925, before George W. Hardison, a notary public, and the clerk's adjudication of the notary's certificate was as follows: "The foregoing certificate of George W. Hardison, N. P., of Washington County, attested by his notarial seal, is adjudged to be correct and in proper form. Let the instrument with the certificates be registered. This 11 October, 1924. C. V. W. Ausbon, C. S. C." The mortgage was registered on the same day—11 October.

On 8 October, 1924, S. D. Davis and his wife executed to the plaintiff Zeb Vance Norman, as trustee for the United Commercial Bank, a deed of trust on the Abram Newberry Farm, to secure a note in the sum of $1,233.74, payable on 1 December, 1924; and on 9 October they acknowledged the due execution of this deed before George W. Hardison, notary public. On 29 October, 1924, the defendant adjudged the sufficiency of the certificate and ordered that the deed be registered. Pursuant to the order, it was registered the next day.

The plaintiffs contend that the defendant's adjudication that the notary's certificate was sufficient is void because not authorized by any statute; the defendant contends that it is valid, and that the mortgage, by reason of its antecedent registration, has priority over the deed of trust. His Honor held with the defendant, and adjudged that the lien of the mortgage is prior and superior to the lien of the deed of trust. Thereupon the plaintiffs excepted, and appealed.

The decisive question is whether in adjudging the sufficiency of the notary's certificate the defendant, who was both clerk and mortgagee, complied with the law in such way as to give the registration of the mortgage priority over the deed of trust.

To admit a deed to probate is no less a judicial act than to take the acknowledgment of the parties. If the proof is had before an official other than the clerk or the deputy clerk of the Superior Court in which the instrument is offered, the clerk or the deputy must examine the certificate and adjudge whether the instrument shall be admitted to registration. C. S., 3305. This examination is the exercise of a judicial function and the clerk, if a party to the instrument, is as a rule disqualified to serve in such a capacity. C. S., 939 (3); *White v. Connelly,* 105 N. C., 65; *Freeman v. Person,* 106 N. C., 252. In some instances the disqualification is removed by statute. All instruments which the law requires or permits to be registered may, if the clerk is a party or interested, be acknowledged or proved before "any justice of the peace of the county of said clerk." C. S., 3299. In another statute it is provided: "If the clerk of the Superior Court is a party to or interested in such instrument, such adjudication and order of registration shall be made by his deputy, or by the clerk of the Superior Court of some other county of this State, or by some justice of the Supreme Court of this State, or some judge of the Superior Court of this State. The acknowledgment of such instruments may also be made before a justice of the peace of said county, and the adjudication of the sufficiency of the certificate of said justice may be made by said clerk or his deputy." C. S., 3305.

The execution of mortgages and deeds of trust may be proved or acknowledged before the justices of the Supreme Court, the judges of the Superior Court, clerks, deputy clerks, commissioners of affidavits, notaries public, and justices of the peace (C. S., 3293); and it is manifest, we think, that the Legislature intended to serve a special and salutary purpose by restricting the certification of the clerk, when he is a party to the instrument, to such "acknowledgments as may be made before a justice of the peace of said county." In any event, we are not at liberty to exercise the legislative function of amending the statute by conferring jurisdiction upon officials from whom, no doubt, it was purposely withheld. The rule is clearly stated in 25 R. C. L., 963: "The courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature, as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. If the true construction will be followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws." As the probate was defective, the registration of the mortgage imparted no constructive notice and gave the instrument no priority over the deed of trust. C. S., 3309; *Todd v. Outlaw,* 79 N. C., 235; *Lance v. Tainter,* 137 N. C., 249; *Fiber Co. v. Cozad,* 183 N. C., 600, 609; *Cowan v. Dale,* 189 N. C., 684: *Bank v. Tolbert,* 192 N. C., 126; *Woodlief v. Woodlief, ibid.,* 634.

The judgment is
Reversed.

WILLIS R. POWELL, ADMINISTRATOR, v. NORFOLK-CAROLINA TIMBER CORPORATION.

(Filed 25 May, 1927.)

Wills—Trusts—Contingent Interests—Sales—Statutes—Powers of Sale—Estates—Contingent Remainders.

Where specific lands are devised for the contingent use of persons *in esse* and *in fuisse*, and sold in proceedings for partition, reserving the interests of all by reinvestment for the then unascertainable devisees under the provisions of our statute, see *Springs v. Scott*, 132 N. C., 548, and cases approving the decision, and also under a duly exercised power conferring upon the trustee or executor, see *Mewborn v. Moseley*, 177 N. C., 110, and case approving this decision, the purchaser in either event gets a good title.

APPEAL by defendant from *Nunn, J.*, at April Term, 1927, of EDGECOMBE.

Controversy without action, submitted on an agreed statement of facts.

Plaintiff, being under contract to convey to the defendant all the timber of given dimensions, on a certain lot of land, duly executed and tendered deed therefor, and demanded payment of the purchase price as agreed, but the defendant declines to accept the deed and refuses to make payment of the purchase price, claiming that the title offered is defective.

It was agreed that if in the opinion of the court, under the facts submitted, the plaintiff was able to convey a good title to the timber in question, judgment should be entered for the plaintiff; otherwise, for the defendant.

The court, being of opinion that the title offered was sufficient to convey the timber as per agreement, gave judgment for the plaintiff, from which the defendant appeals, assigning errors.

Henry C. Bourne for plaintiff.
H. H. Philips for defendant.

STACY, C. J. On the hearing, the sufficiency of the title offered was properly made to depend upon the construction of the following item in the will of Ann Blount Powell:

"Fifth: For the sole purpose of making sale and distribution of the remainder of my estate, I give and devise all the remainder and residue real and personal to my executors hereinafter mentioned, with full power to sell and convey all my right, title, and interest therein, or any part thereof, at such times and on such terms as they may deem advisable for the best interest of all concerned; and I give and bequeath the proceeds arising from such sale or sales, except as herein mentioned, to all my children, share and share alike, that is, they shall have an equal share and same paid over to them without unnecessary delay, except the share to my son Frank, and my daughter Kathleen, whose shares I will and direct to be held in trust for them by my executors, who shall pay to my said son and daughter only the interest or income arising from their respective shares regularly at least once a year, so long as they may live, and at their death or the death of either of them to pay over their share to their children, share and share alike, provided such children are 21 years of age at time of parent's death, but to hold the share or shares of any such children who are not 21 years of age at such time, until they reach such age and pay only the income from their share or shares to them until such time, and then pay over to them their respective shares in full, and I further will and direct, so far as I may be able lawfully to do, that the said respective shares of my said daughter Kathleen and my said son Frank shall not be subject to any of their debts, nor shall their incomes therefrom while in the hands of my executors, nor shall the share or the income of my daughter ever be subject to the debts or control of her husband; and I likewise further will and direct that they and none of their children shall have any right or power to encumber, bargain away, transfer, or sell their respective shares, or any of the income or the interest therein, until they become entitled thereto in full in their own right as herein provided."

The fact situation is that William H. Powell, named as executor in the last will and testament of Ann Blount Powell, duly qualified as such on 17 November, 1911, and died the following year, before the settlement of the estate had been completed, and on 30 March, 1912, Willis R. Powell was duly appointed administrator of the estate *d. b. n., c. t. a.* Thereafter said administrator, together with the other interested devisees, deeming it to the best interest of all parties that the land devised in item five of the will should be actually partitioned and divided, rather than sold for division, brought a special proceeding for that purpose, in which Lot No. 6, the title to which is now in controversy, was allotted "to Willis R. Powell, administrator of Ann Blount, in trust for Kathleen Irwin Johnson and her children." The report of the commissioners in this proceeding was duly confirmed by the court on 18 November, 1912, and the plaintiff herein has since been, and is now, in the actual possession and control of said Lot No. 6, under the terms and conditions set out in item five of the will, as appears above. Kathleen Irwin Johnson is now living, 55 years of age, and she has three children, Mary Johnson Penniman, age 35 years, Henry Irwin Johnson, age 26 years, and Ann Johnson, age 20 years. In April, 1927, the plaintiff herein filed a petition in the Superior Court of Edgecombe County, entitled "In re Willis R. Powell, administrator *d. b. n., c. t. a.*, of Ann Blount

Powell, and trustee under said will for Kathleen I. Johnson and her children, *ex parte*," in which he set out the offer of the defendant herein for the timber mentioned in the contract, etc. Upon consideration of said petition, and after due inquiry, the clerk entered judgment authorizing and empowering the plaintiff herein to accept the offer of the defendant for said timber, and to execute therefor a good and sufficient deed with usual covenants and warranty of title, and to hold the purchase price as a part of the *corpus* of his trust, as above set out. This judgment was duly approved by the judge holding the courts of the Second Judicial District. Whereupon plaintiff duly tendered deed, but as the question of title was not adjudicated in that proceeding, the defendant declined to accept deed, and this controversy has been instituted to determine the question of title.

It can make no difference, so far as the defendant is concerned, whether the plaintiff's authority to convey the timber in question is derived from the judgment in the special proceeding or from the provisions of item five in the will of Ann Blount Powell. The power derived from either source would seem to be sufficient, the former under authority of *Springs v. Scott,* 132 N. C., 548, and cases subsequently affirming the same doctrine, and the latter by virtue of what was said in *Mewborn v. Moseley,* 177 N. C., 110, and *Clifton v. Owens,* 170 N. C., 607.

On the record as presented, we think the judgment is correct, and ought to be upheld.

Affirmed.

STATE v. PEARL MITCHELL.

(Filed 25 May, 1927.)

1. **Homicide—Murder—Evidence—Res Gestæ—Premeditation.**

Where the evidence on the trial for a homicide tends to show that the prisoner broke into a store with the intent to commit larceny, and being confronted by two men guarding the store, fatally shot one and seriously injured the other, on a trial for murder of the first, evidence is competent as to the shooting and injuring of the other as a part of the *res gestæ*, and also upon the element of premeditation necessary to convict of murder in the first degree.

2. **Instructions—Weight and Credibility of Evidence—Contentions—Appeal and Error—Harmless Error.**

A recitation of the contentions of the State upon the trial for murder that the testimony of a witness corroborated the testimony of another witness is not held for reversible error, under the facts of this case, as an expression of opinion of the trial judge upon the weight and credibility of the evidence. C. S., 564.

APPEAL by prisoner from *Harris, J.*, at January Term, 1927, of CHATHAM.

Criminal prosecution, tried upon an indictment charging the prisoner with a capital felony, to wit, murder in the first degree.

Verdict: Guilty of murder in the first degree (as shown by return to writ of *certiorari*).

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. P. Horton for the prisoner.

STACY, C. J. The evidence on behalf of the State—none seems to have been offered by the prisoner—is to the effect that on the night of 15 January, 1927, the prisoner, Pearl Mitchell, a colored man, burglariously entered the storehouse of Vance Cheek at Ore Hill, in Chatham County, with intent to steal the goods and chattels of another then being in said storehouse, murdered W. L. Fogleman while attempting to perpetrate said robbery by shooting him in the head with a pistol, the bullet taking effect just under the right eye, engaged in a fight with Allen Cheek, 19-year-old son of Vance Cheek, who, with the deceased, was there watching the store for robbers, successfully made his escape after breaking away from young Cheek, and was arrested at his uncle's home the following night.

The prisoner objected to any evidence tending to show the fight which ensued between him and young Cheek immediately following the homicide, on the ground that such evidence was irrelevant and incompetent in the present trial, being, as it is, for the murder of Fogleman. But the fight with Cheek and the homicide of Fogleman were but parts of the same encounter. Indeed, the prisoner was fighting with both, and he shot both. The first shot proved to be fatal, while the second did not. The evidence was competent, not only as a part of the *res gestæ,* but also as tending to show premeditation on the part of the prisoner. *S. v. Westmoreland,* 181 N. C., 590; *S. v. Robertson,* 166 N. C., 356.

The prisoner complains at certain expressions used by the judge in recapitulating the evidence to the jury, as follows:

"Mr. Hanna said that Mr. Cheek came to his house after the trouble and told him about it, and he corroborated Mr. Cheek's statement. . . . Then Mr. Cheek's father testified. He told you that he had his store guarded; that he had his son guarding the store for him, and he corroborates Allen Cheek in his statement as to what occurred in the store, saying that his boy had told him how it all had happened, and he corroborated Allen Cheek's testimony on the stand. . . . Lacy Heritage was the next witness, and he corroborates Cheek. . . . Then Mrs. Holliday was the next witness on the stand. She corroborates Allen Cheek in his statement, and said that his face was bloody and his hands had blood on them."

It is the contention of the prisoner that these expressions are violative of C. S., 564, which provides: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon."

Under numerous decisions dealing directly with the subject, this statute has been interpreted to mean that no judge, in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved, it being the true office and province of the jury to weigh the testimony and to decide upon its adequacy to establish any issuable fact. *S. v. Kline,* 190 N. C., 177; *S. v. Hart,* 186 N. C., 582; *Speed v. Perry,* 167 N. C., 122.

Here the judge used a short-hand method, as it were, in stating the evidence of some of the witnesses, by saying, in effect, that "they corroborated Allen Cheek in his statement of what transpired in the store." It clearly appears, we think, that no possible harm has come to the prisoner from the judge's method of expression; hence, we cannot hold it for reversible error on the present record. There was no denial of Allen Cheek's testimony, and the witnesses mentioned did in fact corroborate his statement of what transpired in the store.

The remaining exceptions call for no elaboration. They present no new question of law, or one not heretofore settled by our decisions. After giving to each of them the consideration which the importance of the case demands, we conclude that they are without merit, and cannot be sustained.

The verdict and judgment will be upheld.

No error.

J. L. ROSS v. DR. ADDISON G. BRENIZER.

(Filed 25 May, 1927.)

Physicians and Surgeons—Negligence—Evidence—Appeal and Error—Harmless Error.

Where the plaintiff was a patient of the defendant physician and sues him for damages for malpractice in performing an operation for hernia, basing his right to recover solely on defendant's negligence in stitching up some of the plaintiff's intestines in closing the incision, causing the necessity of a second operation and serious and permanent injury, testimony of a witness as to the precautions to be observed to prevent a recurrence of the hernia given him in an entirely unrelated operation for hernia on himself, at the same hospital and by a different surgeon, is erroneously admitted, but harmless and without prejudice to the plaintiff, under the facts of this case.

CIVIL ACTION, before *Oglesby, J.*, at January Term, 1927, of CABARRUS.

Plaintiff instituted an action for damages against the defendant, Dr. Addison G. Brenizer, a physician and surgeon.

The plaintiff alleged, and offered evidence tending to prove, that he was suffering with hernia, and consulted the defendant, who advised him to have an operation, and assured him that it would be "a small operation" and would not require him to remain in the hospital more than about ten days. That on or about 14 February, 1923, the plaintiff went to Charlotte for the purpose of having the operation performed, and that on 15 February the plaintiff was taken to the operating room and an operation performed upon him; that after the operation plaintiff began and continued to suffer severe pain, attended by a swelling, rendering it necessary for him to undergo a second operation. The plaintiff testified that the defendant told him soon after the operation that Dr. Worthington had actually performed the operation "and through misfortune had sewed up one of the plaintiff's intestines in the incision, and that this was what had caused the trouble." The defendant admitted that he was consulted by the plaintiff, and that he and his partner and assistant, Dr. Worthington, had performed the operation upon the plaintiff. The defendant emphatically denied that plaintiff's intestine had been sewed up in the incision, but testified that the stitches in the wound had pulled loose, causing the intestine to push up through the incision. This resulted in an obstruction. Dr. Worthington also emphatically denied that plaintiff's intestine had been sewed up in the line between the peritoneum.

Two issues were submitted to the jury:

1. Was the plaintiff J. L. Ross injured by the negligence or want of skill of defendant, as alleged in the complaint?

2. What damage, if any, is the plaintiff entitled to recover?

The jury answered the first issue "No," and from judgment upon the verdict, plaintiff appealed.

Palmer & Blackwelder and Hartsell & Hartsell for plaintiff.
H. S. Williams and John M. Robinson for defendant.

BROGDEN, J. The chief exception appearing in the record is based upon the following question to the plaintiff's witness, Tolbert: "(Q.) You may state after you were operated on and before leaving the hospital, what instructions or warnings were given you as to how you should act, or what you should do in order to prevent a recurrence of the trouble." The witness replied that he had been operated on for hernia by Dr. Gibbon, and that he had been instructed by his surgeon not to get up on his tiptoes or reach up high or lift anything or stoop low, or do anything of that nature, as it would probably cause a recurrence of the hernia. Plaintiff objected to this testimony, and it was admitted by the court. The testimony, upon its face, is incompetent, and should have been excluded. However, the plaintiff testified that he was basing his entire case upon the statement made to him by Dr. Brenizer, the defendant, that in closing up the wound his intestine had been sewed up in the incision. The exact words of the plaintiff are as follows: "That is what I am basing my case on, the statement Dr. Brenizer made to me. He made that to me after the second operation and before I left the hospital. He said he was sorry I had the misfortune I had; that he let Worthington do the operation; that he was busy at the time; that is what I am basing my case on."

It is apparent, therefore, that the plaintiff made no contention that the defendant was negligent in failing to give him proper instructions as to how he should care for himself in order to prevent a recurrence of the hernia. Hence, the testimony objected to had no bearing upon the cause of action, as alleged by the plaintiff. Moreover, the admission of the testimony was in plaintiff's favor, and against the defendant, for the reason that under the circumstances of the case it might have been contended that the defendant was negligent by reason of his failure to give plaintiff proper instructions. So that, upon the setting of the case, and upon the entire record, we are of the opinion that the error complained of did not prejudice plaintiff's cause, and is not of sufficient weight to warrant a new trial.

Affirmed.

MYRTLE HANIE, ADMINISTRATRIX, v. D. H. PENLAND, SHERIFF, AND JOE RICE.

(Filed 25 May, 1927.)

Actions—Wrongful Death—Negligence—Statutes—Conditions Annexed—Statute of Limitations.

The statutory requirement that action must be brought in a year to recover damages on account of the wrongful killing of another is a condition annexed thereto, and need not be pleaded as a statute of limitation in defense; and where there is no evidence tending to show that the plaintiff has performed this condition, he may not maintain his action. C. S., 160.

CIVIL ACTION, tried before *Schenck, J.,* at November Term, 1926, of BUNCOMBE.

The plaintiff is the duly appointed administratrix of Garfield Hanie, her husband, who was killed by the defendant Joe Rice on or about 7 April, 1924. The plaintiff further alleged and offered evidence tending to show that Joe Rice was a special deputy of the defendant D. H. Penland, sheriff of Buncombe County; that on or about 6 April, 1924, the said Joe Rice went to the office of B. L. Lyda, a justice of the peace of Asheville, and made an affidavit, upon oath, that one............did unlawfully, etc., maintain and set up a gambling board, to wit, "a punchboard, etc." Thereupon, on 6 April, 1924, the said justice of the peace issued a warrant directed "to any constable or other lawful officer of Buncombe County, commanding the arrest of 'John Doe, alias.'" Thereafter, on 7 April, 1924, the said Joe Rice, special deputy, went to Woodfin, on the Weaverville road, and saw a man who he was informed was the "punchboard man." This unidentified person got in his car and started to move off. Rice jumped on the running board. The occupant of the car either pushed Rice off the car or Rice got off, and thereupon drew his pistol and began to fire at the car. Garfield Hanie, plaintiff's intestate, passed by the side of the car at that time and was shot by the defendant Rice and killed. It does not appear who the occupant of the car was, or whether he was the "punchboard" man or not. Garfield Hanie, plaintiff's intestate, was an innocent bystander, and had no connection whatever with the transaction. The defendant Rice contended that the shooting of Hanie was an accident. However, he filed no answer, and judgment was taken against him by default. The cause of action alleged by plaintiff against the defendant Penland is based upon the theory that the sheriff is responsible for the negligence of his deputies.

The ninth paragraph of the complaint is as follows: "That by reason of the negligence of the defendants in the manner and respect herein alleged, and as a proximate cause thereof, the plaintiff's intestate was unlawfully and wrongfully killed by the defendants above named."

At the conclusion of plaintiff's evidence, there was judgment of nonsuit, and the plaintiff appealed.

W. R. Gudger and Zeb F. Curtis for plaintiff.
A. Hall Johnston for defendant Penland.

BROGDEN, J. The cause of action alleged in the complaint was for wrongful death of Garfield Hanie, plaintiff's intestate, by virtue of the negligence of Joe Rice, a special deputy of defendant Penland, sheriff of Buncombe County.

The plaintiff offered in evidence the summons in the action, issued 8 March, 1926, and served on the defendants on 9 and 12 March, 1926. It further appears from the record that plaintiff's intestate was killed on 7 April, 1924. It does not appear from the record that there was any evidence whatever offered tending to show that the suit for wrongful death of plaintiff's intestate was brought within a period of one year from the date of the accrual of the cause of action, to wit, 7 April, 1924. Indeed, the summons which was offered in evidence shows conclusively that the suit was not brought within one year after the cause of action accrued. C. S., 160, provides that an action for wrongful death must be "brought within one year after such death by the executor, administrator, or collector of decedent."

In *Bennett v. R. R.,* 159 N. C., 346, this Court held: "Under this statute, giving a cause of action on account of the wrongful killing of another, the provision that suit shall be brought within one year after death is a condition annexed, and must be proved by the plaintiff to make out a cause of action, and is not required to be pleaded as a statute of limitation." *Gulledge v. R. R.,* 147 N. C., 234; *Gulledge v. R. R.,* 148 N. C., 567; *Belch v. R. R.,* 176 N. C., 22; *Reynolds v. Cotton Mills,* 177 N. C., 412; *Brick Co. v. Gentry,* 191 N. C., 636.

The judgment of nonsuit is therefore correct, and is

Affirmed.

J. R. CRYE v. J. PERRY STOLTZ AND FLEETWOOD OF HENDERSONVILLE CORPORATION.

(Filed 25 May, 1927.)

1. **Judgment—Default—Motions — Excusable Neglect — Meritorious Defense.**

   The party moving within a year to set aside a judgment taken against him for mistake, inadvertence, surprise, or excusable neglect, C. S., 600, must also make it to appear that he has a meritorious defense.

2. **Clerks of Court—Judgments—Default—Jurisdiction—Statutes.**

   Where the complaint declares upon a contract and alleges damages for its breach in a sum certain, and sets up matters that would constitute a statutory lien upon the subject-matter of the contract, the clerk of the court, under the provisions of our statute, has authority to render judgment by default for the want of an answer in the specific amount demanded, and to declare and enforce the lien, C. S., 595; 3 C. S., 593, and issue an execution thereunder, and order a distribution of the funds so received. Chapter 222, Public Laws 1925. *Held further*, the rights of lienors not parties to the action not being presented, the Court does not pass thereon.

3. Same—Liens—Parties—Appeal and Error.

Where a judgment by default final has been obtained against a corporation, providing for the enforcement of a statutory lien, a receiver therefor afterwards appointed cannot complain that the trustee in a deed of trust for the benefit of creditors had not been made defendant on his motion to set aside the judgment for excusable neglect, when by the terms of the instrument such liens were not disturbed or affected.

APPEAL by John T. Wilkins, receiver of Hendersonville Hotel Corporation, from *Parker, J.*, at January Term, 1927, of HENDERSON.

Summons was issued on 22 July, 1926, and was returnable 5 August. The complaint, duly verified, was filed when the summons was issued, and the summons and complaint were served on the defendants 22 July, 1926. A warrant of attachment was issued against the property of Stoltz, a nonresident.

The plaintiff alleged that on 26 September, 1925, he made a contract with Stoltz, owner of the property known as Fleetwood of Hendersonville Hotel Corporation property, to clear certain roadways, to make gradings and excavations and to perform certain other work at an agreed price, the amount of which was $6,609.62. Further, that the Fleetwood Hendersonville Hotel Corporation entered into a joint obligation with Stoltz to carry out and perform the contract with the plaintiff. Time for filing the answer was extended to 1 September, and afterwards to 20 September. On 25 October, 1926, no answer having yet been filed, the clerk gave judgment by default final for $6,609.92, as the liquidated sum due the plaintiff.

On 27 December, 1926, John T. Wilkins, receiver of the Hotel Corporation, moved upon affidavit to set aside the judgment under C. S., 600, for surprise and excusable neglect, alleging that an execution had been issued on the judgment, and that the sheriff had gone through the form of selling the land to the plaintiff.

A restraining order was issued and the cause was heard before Judge Parker. The affidavit was then amended so as to allege a want of authority on the part of the clerk to render the judgment. The motion was denied, and the receiver excepted and appealed.

Harkins & Van Winkle and W. B. Snow for appellant.
Stephen Nettles and Ewbank, Whitmire & Weeks for appellee.

ADAMS, J. At any time within one year after notice thereof the judge, upon such terms as may be just, may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. C. S., 600. There are numerous decisions which hold that the applicant for relief under this section must show a meritorious defense as well as mistake, inadvertence, surprise, or excusable neglect. *Cook v. Bailey,* 190 N. C., 599; *Duffer v. Brunson,* 188 N. C., 789; *Bank v. Duke,* 187 N. C., 386; *Land Co. v. Wooten,* 177 N. C., 248; *Crumpler v. Hines,* 174 N. C., 283. In the judgment appealed from there is an express finding, not only that no surprise or excusable neglect has been proved, but that the defendants have been negligent, and have failed to show any meritorious defense to the plaintiff's cause of action. These findings, supported by the evidence, are conclusive, and therefore not reviewable on appeal. *Turner v. Grain Co.,* 190 N. C., 331.

In our opinion the appellant's position that the clerk had no authority to render judgment by default, or to declare the lien is not maintainable. Judgment by default final may be had, as provided in C. S., 595; and in 3 C. S., 593, it is provided that the clerk may enter such judgments by default final as are authorized by section 595 *et seq.* It is further provided by the act of 1925 that execution may be issued by the clerk upon judgments before him under section 593, and that he may make a final order of disbursement. Public Laws 1925, ch. 222. We see no practical or satisfactory reason why an execution should not be issued, under the facts before us, by virtue of this section.

The appellant suggests that the judgment rendered by the clerk had the effect of excluding, without a hearing, all other parties who had filed liens against the property. This, however, is a matter for the lienors. As to them, the judgment makes no provision, and as their status has not been adjudicated, of course they have not appealed. It is, therefore, not necessary to discuss as an academic question the bearing on the appellant's contention of *Harris v. Cheshire,* 189 N. C., 219, and similar cases.

The fifth assignment of error advances the proposition that as the defendant corporation made a conveyance of its property to trustees for the benefit of creditors prior to the institution of the present action, or the filing of the plaintiff's lien, the trustees not being parties, the judge should have vacated the judgment given by the clerk. We think a sufficient answer to this position may be found in the following paragraph of the deed of trust: "It is the intent and purpose of this instrument, and it is understood and agreed by the parties hereto, that the execution and delivery and the acceptance of the same shall not have the effect of destroying, affecting, or operating as a waiver of any liens or lien rights which any contractors, subcontractors, material furnishers, mechanics, or laborers may now possess, or to which they may now be entitled under the laws of North Carolina, and that all such liens or lien rights are fully reserved and preserved in any and all property of the Fleetwood of Hendersonville Hotel Corporation."

In view of this provision, we do not perceive how the failure to make the trustees parties to the action operates as a preference which, under the judge's findings, would defeat the judgment recovered by the plaintiff.

The judgment is
Affirmed.

R. C. ROBINSON v. J. B. IVEY & COMPANY, A CORPORATION.

(Filed 25 May, 1927.)

1. **Master and Servant—Principal and Agent—Vice-Principal—Employer and Employee—Alter Ego.**

One who is in charge of the men's department in a department store is the vice-principal or *alter ego* of the company operating the store, in his relationship to salesmen and other employees therein at work within the scope of their employment, and who work under his instructions.

2. **Same—Negligence — Contributory Negligence — Vice-Principal—Alter Ego.**

Where there is evidence tending to show that one employed in a department of a store, under the order of the vice-principal or *alter ego* of the owner, climbs upon the shelves to take samples of men's hats from their boxes and give them to the vice-principal for the purpose of checking the stock with a list he has in his office, in returning the hats to the boxes is injured by the shelf on which he was climbing giving way and precipitating him to the floor, to his injury, and from causes that the employee could not reasonably be presumed to have anticipated, and that a step-ladder was available elsewhere in the store, and known to the vice-principal, which he did not supply: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence in failing in its nondelegable duty to furnish the injured employee a safe place and method or appliance to do the work thus required of him.

3. **Evidence—Trials—Nonsuit—Directing Verdict.**

Defendant's motion as of nonsuit, or a directed verdict in its favor, will be denied when the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment therefrom, is sufficient to take the case to the jury and support a verdict as a matter of law in the plaintiff's favor.

4. **Master and Servant—Fellow-Servants—Railroads—Statutes.**

The law relating to the doctrine of fellow-servants has been only modified in regard to its application to those employed by railroad companies operating in this State. C. S., 3465.

5. **Appeal and Error—Constitutional Law—Matters of Law—Verdict.**

Under the provisions of our State Constitution, the Supreme Court is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the Superior Court, and it may not otherwise pass upon the verdict of the jury as to facts proven by the evidence. Constitution of N. C., Art. IV, sec. 8.

APPEAL by defendant from *R. Lee Wright, Emergency Judge,* and a jury, at January Special Term, 1927, of MECKLENBURG. No error.

This is an action for actionable negligence brought by plaintiff against defendant. The plaintiff was a salesman in the store of defendant; his duties were to assist in checking stock against invoice, and to take stock out of the shelves in the storeroom, and generally to perform such duties around the store of the defendant as he was ordered to perform in connection with the receipt, handling, and sale of merchandise, the duty to perform various services usually performed by salesmen. The allegations of negligence made by plaintiff: "That the defendant was guilty of negligence which proximately caused the injuries of the plaintiff, in the following particulars, viz.: (a) The defendant failed to use or exercise ordinary care to provide for the plaintiff a safe place in which to work, and required him, in the discharge of his duties, to climb upon shelves which were unsafe and dangerous, and were likely to turn and throw him to the floor and injure him. (b) The defendant failed to provide for plaintiff safe and suitable appliances with which to do the work which he was required to perform, and failed to furnish him any stepladder, bench, or other appliance upon which to climb or stand when placing the hats on the top of the shelves in its said building, and required him to climb upon the shelves in order to place the hats on top thereof. (c) The defendant allowed one of the shelves upon which the plaintiff, and its other employees, were required to climb, to be and remain in a defective condition, so that when the plaintiff stepped upon same in the course of his duty and regular line of his employment, it split and turned so as to throw plaintiff to the floor, and although defendant required its employees to climb upon the shelves, it failed to inspect same and to make same reasonably safe for use by its employees in climbing. (d) The defendant's manager, under whom the plaintiff was working, negligently ordered and directed plaintiff to climb upon the shelves which had been built in defendant's storeroom for the purpose of placing hats in the boxes on the top of said shelves, although the said shelves had not been built for the purpose of being climbed upon, and were not sufficiently strong to be used for that purpose, and were not inspected and kept in a safe condition for that purpose."

The plaintiff alleged that as a result of the aforesaid negligence of defendant, the shelf was in a defective condition, and he was thrown to the floor, and from the fall his left knee was permanently injured.

The defendant denied any negligence on its part, and set up the plea of contributory negligence. "That if the plaintiff was injured by the negligence of the defendant, as alleged in the complaint, which is expressly denied, the plaintiff by his own negligence contributed to his said injury, which said contributory negligence was the direct and proximate cause of whatever injuries he suffered, in that he conducted himself on and about the said shelves in a negligent and careless manner, in that he voluntarily jumped therefrom and failed and refused, in conducting himself on and about the said shelves, to use the safe means which were available, and failed to act with due regard for his safety."

The material part of Cecil (R. C.) Robinson's, plaintiff's, testimony necessary to be considered in the determination of the case is as follows:

PLAINTIFF'S TESTIMONY.

I was working with J. B. Ivey & Company on 17 April, 1925. I had been working there 6 or 8 months in the gents' furnishing department. I was 21 years old. I was making $21.50 per week and a bonus, which amounted to a week's pay every month if the department made its quota. The gents' furnishing department was on the first floor. My superior was Charles Creighton. I got hurt in the stock room on the 5th floor. I was up there checking an order of some straw hats that had arrived for our department. Mr. Creighton went up there with me. I had not been doing that kind of work before. I was checking an order of some straw hats with Mr. Creighton in the stock room. The hats were on top of the shelves on top of a section of shelves in the stock room. I was getting a hat of each style down to check the order. The hats were on top of the shelves in the stock room on top of a section of shelves. They were in pasteboard boxes. The boxes were about 3 feet deep. The section of shelves that I refer to was in the middle of the stock room. The top of the shelves was about eight feet, and the top of the shelves was about 4 or 5 feet wide. There were 6 or 7 shelves from the floor up to the top. I went to the stock room with Mr. Creighton. He was my superior.

Q. After you and Mr. Creighton got up there, what did Mr. Creighton tell you to do, if anything? A. Climb on the shelves and take the hats down, one of each style.

Q. Did you do that? A. Yes, sir.

Q. Where was Mr. Creighton when you did that? A. He was sitting on a box down there, and I would pitch him the hats down there.

Q. Did he tell you how to get up on top of the shelves? A. Yes.

Q. What did he tell you? A. Climb those shelves.

Q. What did you do after you got up on top of the shelves? A. I pitched him the hats down, different styles.

Q. How many times before had you ever climbed on top of those shelves? A. I had never climbed up before.

Q. What other way was there for you to get on top of the shelves except to climb if you did? A. No other way.

Q. What other implements did they have around there that you could use in getting up there? A. Not any.

Q. After you got the hats, what did you do? A. I came down.

Q. Then what happened? A. He checked the orders of the hats, and when he had finished with the hats he took two or three of them down by the office and told me to put the rest of them back in the boxes.

Q. Where were the boxes? A. On top of the shelves.

Q. Go ahead and describe what you did then. A. I was taking the hats up, two hats, and I had put them together and put them in the shelf then climbed so I could get them up, and as I was climbing up on about the third or fourth shelf and started to take a step and the shelf broke, pulled loose, gave way, or something, and that threw my foot off and I fell down and my leg was like this; it threw me down.

THE NECESSARY EVIDENCE OF DEFENDANT.

Charles Creighton's testimony, in part, on cross-examination, is as follows:

I am manager of the men's department at Ivey's, and the plaintiff was working in that department under my orders and instructions. It was his duty to do what I told him to do. On this day, 17 April, 1925, I wanted to go up in the stock room and do something with reference to some straw hats, and I took the plaintiff along with me, it being his duty to do what I told him. These hats were in boxes on top of the shelves. There was a double row of shelves meeting back to back. . . . I was not going to get a hat out of each of the boxes, but only out of some of the boxes. I had the list of stock numbers of the boxes out of which I wanted to get each particular hat. I did not tell the plaintiff how to get up there; I told him to get up there. There were always ladders in the stock room, a step-ladder. I do not know where it was that particular day; I did not say anything to him about getting a ladder. There was not one at that particular spot. The plaintiff had been in the stock room several times. I was standing right there with him, within about 3 feet. I told him to get up on top of the ledge or platform. I left it to him as to how he should get up there.

Q. How did you intend for him to get up there? A. I left that to him.

Q. How did you expect Mr. Robinson to get up on the top of the platform? A. I expected, if he wanted to be very careful, to go get the ladder and climb up there.

Q. You expected him to get the ladder and climb up there, is that what you tell the jury? A. Yes.

Q. And it surprised you when he did not do that? A. It did not surprise me.

Q. He did not do what you expected him to do. You just now told the jury when you told him to get up there you expected him to go and get the ladder and climb up there? A. Yes.

Q. And when he did not do that, he did not do what you expected him to do, did he? And you stood there and saw him climbing up on the shelves? A. Yes.

Q. And you did not tell him not to do it? A. No, sir.

The witness Creighton did not see the plaintiff fall, as he had left the place.

E. T. Whitaker testified in part: "I am in the employ of J. B. Ivey & Company, and I was in its employ in April, 1925, as stock-room manager. I remember the occasion when Mr. Robinson was hurt. On the day Mr. Robinson was hurt, Mr. Creighton and Mr. Robinson came to the stock room together. Mr. Creighton told Mr. Robinson to go up on top of some shelves and throw him down some boxes of hats, and Mr. Robinson went up there and threw the hats down to Mr. Creighton, and Mr. Creighton took out what he wanted. Ed Earl was helping at the time they were getting those hats, and he told Earl to throw the boxes back up to Mr. Robinson, and he took the hats he wanted and went on downstairs. From the time Mr. Robinson got up on the shelves until Creighton left, Robinson was up on top of the ledge. When I say ledge, I mean the top of the shelves. When Mr. Creighton left, Ed Earl threw the boxes of hats back up to Mr. Robinson and he placed them back where they should go. Ed finished throwing all the boxes up and then Robinson slid down off the front of the shelves, the end of them.

"Q. Will you just show on the end of this table exactly how he did, assuming the side of the table toward the stenographer is the side of the shelves? A. He put his hands on the edge of the shelf and slid down backwards, slid down as far as he could go, then dropped to the floor. When he dropped to the floor he fell down on his knees and got up and hobbled over to a chair right beside my desk, sat down, laid his head down on a little wagon, and was sitting there, and he sat there a minute or two, and I says, 'Robinson, what is the matter?' He says, 'I hurt my leg; I must have strained it when I dropped down off of those shelves.' He says, 'I hurt it once before and I hope it is not hurt like it was, because I had to go on crutches for quite a while before.' I then called up Mr. Creighton and told him Mr. Robinson was hurt, and I would bring him down on the freight elevator."

Ed Earl's testimony was practically the same as the witness Whitaker's as to how the plaintiff was injured.

Cecil (R. C.) Robinson was corroborated by statement to his father, Rev. C. M. Robinson, a few days after the injury.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the plaintiff by his own negligence contribute to his own injury, as alleged in the answer? Answer: 'No.'

"3. What damage, if any, is the plaintiff entitled to recover? Answer: '$2,500.'"

The court below rendered judgment for plaintiff on the verdict. Defendant assigned numerous errors, and appealed to the Supreme Court. The necessary assignments of error will be set forth in the opinion.

John M. Robinson, Stewart, McRae & Bobbitt, and Conley E. Robinson for plaintiff.

Tillett, Tillett & Kennedy for defendant.

CLARKSON, J. There are no exceptions made by defendant to the charge of the court below. The defendant contends: (1) That plaintiff should have been nonsuited, C. S., 567; (2) that defendant was entitled to a directed verdict; (3) that upon the undisputed evidence the plaintiff failed to make out a case of actionable negligence. We cannot so hold.

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

As to how the occurrence took place, and what caused the plaintiff's injury: Plaintiff contends that *"the shelf broke, pulled loose, gave way, or something,"* that caused the fall. Defendant contended that after plaintiff had put all the boxes back where they should go, *"Robinson slid down off the front of the shelf, the end of them. . . . He put his hands on the edge of the shelf and slid down backwards, slid down as far as he could go, then dropped to the floor."*

The disputed facts as to how plaintiff was injured, the jury accepted the plaintiff's version. We can only consider here "any matter of law or legal inference." Const. N. C., Art. IV, sec. 8. There is an impenetrable wall between the law and the facts. The facts for the jury, the law for the court.

In the present case, Creighton, who gave the order to plaintiff, was not a fellow-servant of the plaintiff. He was, in law, the vice-principal, *alter ego,* of the defendant company. Creighton himself testified that he was the manager of the men's department of defendant company, in which plaintiff was working, and plaintiff was under his orders and instructions. "It was his duty to do what I told him to do." Plaintiff said: "My superior was Charles Creighton." *Patton v. R. R.,* 96 N. C., p. 455; *Thompson v. Oil Co.,* 177 N. C., 279; *Davis v. Shipbuilding Co.,* 180 N. C., 74.

In passing, we may state the doctrine of fellow-servant has been abrogated by statute as to railroads operating in this State. C. S., 3465.

Defendant contends: Just before plaintiff was hurt, the shelves stood the highest possible test. When the plaintiff was hurt he knew more about the shelves than anyone else. Plaintiff was allowed to go about his work in his own way. It was a simple thing he was doing, in his own way. That climbing is one of the primal instincts. Defendant cites many cases in which nonsuits were granted: The hammer case, *Martin v. Mfg. Co.,* 128 N. C., 264; the gangway case, *Shaw v. Mfg. Co.,* 143 N. C., 131; the railroad window case, *House v. R. R.,* 152 N. C., 397; the old shed case, *Rumbley v. R. R.,* 153 N. C., 457; the crosstie case, *Simpson v. R. R.,* 154 N. C., 51; the coal wagon case, *Bradley v. Coal Co.,* 169 N. C., 255; the box car case, *Bunn v. R. R.,* 169 N. C., 648; the slick-face hammer case, *Morris v. R. R.,* 171 N. C., 533; the axe-head case, *Winborne v. Cooperage Co.,* 178 N. C., 88; the tree case, *Angel v. Spruce Co.,* 178 N. C., 621.

Defendant cites from the *Rumbley case, supra,* the following: "The Court said: 'The work that plaintiff was given to do was simple in operation, well within his experience and training, and he was left to select his own methods of doing it."

We think the decisions bear out the contentions of defendant based on the facts as defendant views them, but we cannot so interpret the facts. In the present case the jury has found the facts as contended by plaintiff. Plaintiff's vice-principal, Creighton, who plaintiff was in duty bound to obey, was ordered by Creighton to climb some shelves in the stock room on the fifth floor, and get some hats out of pasteboard boxes on top of the shelves. Plaintiff had never climbed up the shelves before. The shelves were in sections. There were about 7 shelves from the floor to the top. Plaintiff climbed up and pitched the hats down to Creighton. He then came down and Creighton checked the orders and took two or three hats and told him to put the rest in the boxes on the top shelf. He started climbing up with the hats and when up on the third or fourth shelf "started to take a step and the *shelf broke, pulled loose, gave way, or something,* and that threw my foot off and I fell down, my leg was like this; it threw me down."

The plaintiff charged negligence, "(1) defective and unsafe condition of the shelf; (2) failure to furnish a step-ladder; (3) negligent order of Creighton, the plaintiff's superior."

In the *Patton case, supra,* in obedience to the command of a vice-principal (section master), the employee on a freight train, while passing the place where the employee was to work, was ordered by the section master to jump from the moving train. The employee promptly obeyed the command, and the Court said: "The facts and circumstances were such as that he might, when suddenly called on, not unreasonably believe that the command was a proper one, that he ought to obey. Although the act was hazardous, it was not essentially dangerous. It was done suddenly and in obedience to the command of one who had the right to direct the laborer in the course of his duty. The latter had but a moment to think of duty—a moment to think of danger. The law attributes the injury in such case to the negligence of the employer; its agent gave the unwarranted, negligent command, the injured party simply obeyed, and was not negligent because under the circumstances he did obey. It would be unreasonable and unjust to allow the employer to have immunity from civil liability for its own negligence, or that of its agent, thus resulting in injury to a faithful servant."

In *Howard v. Oil Co.,* 174 N. C., at p. 653, it is said: "It is well recognized that, although the machinery and place of work may be all that is required, liability may, and frequently does, attach by reason of the negligent orders of a foreman, or boss, who stands towards the aggrieved party in the place of vice-principal. *Ridge v. R. R.,* 167 N. C., 510; *Myers v. R. R.,* 166 N. C., 233; *Holton v. Lumber Co.,* 152 N. C., 68; *Noble v. Lumber Co.,* 151 N. C., 76; *Wade v. Contracting Co.,* 149 N. C., 177."

Plaintiff was working under the direct orders of defendant's vice-principal. See *Noble v. Lumber Co., supra,* where a servant was ordered to remove a shiver from a running machine; *Myers v. R. R., supra,* where a servant was ordered to board a moving train; *Ridge v. R. R., supra,* where a servant was ordered to walk across the top of a freight car while the roof was "jumping up and down" (at p. 522); *Howard v. Oil Co., supra,* where a servant was ordered to remove a saw cylinder while the saw was in motion; *Thompson v. Oil Co., supra,* where a servant was ordered to "scotch" a car with a crowbar; *Davis v. Shipbuilding Co., supra,* where a servant was ordered to work under a defective crane; *Tatham v. Mfg. Co.,* 180 N. C., 627, where a servant was ordered to remain at work while a train was approaching; *Perkins v. Wood and Coal Co.,* 189 N. C., 602, where an emergency servant was ordered to work under a steam shovel which was tripped by another servant. *Terrell v. Washington,* 158 N. C., at p. 289; *Thomas v. Lawrence,* 189 N. C., p. 521; *Fowler v. Conduit Co.,* 192 N. C., p. 14; *Burgess v. Power Co., ante,* p. 223; *Butler v. Fertilizer Works, ante,* p. 632; 26 Cyc., 1185, 1213, 1216.

The place of the accident was on the fifth floor of a large department store; nothing was provided for plaintiff to climb up on to get the hats in the boxes on the top shelf. No step-ladder or other usual and common appliance. From the reasonable inference of the testimony, the step-ladder could have been easily obtained by Creighton, the vice-principal. It seems to be in common use, and rightly so, for the purpose. Creighton ordered plaintiff to climb the shelves. He obeyed. The shelf broke, etc., and he was injured. A small matter of getting the step-ladder—a trifle, as it were, would have saved plaintiff perhaps a lifetime of suffering.

In *Clinard v. Electric Co.,* 192 N. C., p. 742, it is said: "In *Bailey v. Meadows Co.,* 154 N. C., p. 71, it is held: 'That it is the duty of the master to furnish the servant proper appliances to do dangerous work, if there are such in general use, is well settled. *Orr v. Tel. Co.,* 130 N. C., 627. This negligence of the master 'consists in his failure to adopt and use all approved appliances in the performance of their duties.' *Marks v. Cotton Mills,* 135 N. C., 290. The master is not required to adopt every new appliance as soon as it is known.' The duty of an employer to use due care to furnish sufficient help, tools, etc., to the employee is held in *Pigford v. R. R.,* 160 N. C., p. 93, to be a 'primary, absolute, and nondelegable duty.' It will be noted in the *Bailey case, supra,* it speaks of *dangerous work.* In such cases the appliances must be such as are in general use. The removal of the steel tank weighing 530 pounds is not necessarily dangerous, although the method of doing it may be. Simple appliances or instruments, is a matter of common knowledge and observation, such as ropes, chains, etc., and sufficient help may, under certain circumstances, of necessity be needed."

It may be of interest to note that the senior of the present firm representing defendant, able and learned, a Nestor of the bar, was the attorney for Orr in the *Telephone Co. case, supra,* which blazed the way in this State that the employer must use due care in furnishing appliances and instrumentalities for protecting employees. In that case it was held: "Where a telephone company fails to furnish an employee with proper tools and appliances with which to do dangerous work, it is liable for injury caused by such negligence."

Without obedience, we would have chaos and anarchy, the industrial life would be stagnant. The plaintiff was under the instructions of defendant's vice-principal. Under the facts and circumstances of this case he was ordered to climb the shelves in obedience to duty and command. The shelf broke, etc., and he was thrown down and permanently injured—from the finding of the jury—without fault on his part; unless it is a fault for an employee to obey his superior under such circumstances. We cannot so hold. The charge is not in the record; the presumption is that the court charged the law correctly on all the issues, laid down the rule of due care, the prudent man, under the facts and circumstances of the case; charged correctly as to negligence, proximate cause, contributory negligence, and damages.

In this State it is held, on the question of proximate cause (see cases cited in *Clinard v. Electric Co., supra,* at p. 741): "That it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act."

We can find

No error.

L. R. SUGG ET AL., PARTNERS, TRADING AS SUGG BROTHERS, v. ST. MARY'S OIL ENGINE COMPANY AND CENTRAL TRUST COMPANY OF ST. CHARLES, MISSOURI, INTERVENER.

(Filed 25 May, 1927.)

1. **Interpleader—Attachment—Issues.**

Where the note of a nonresident defendant has been attached by process issuing out of the courts of this State, and claimed by an intervener as a bona fide purchaser for value, without notice, before maturity and prior to the time of the attachment, and the defendant in attachment has paid the money into court to abide its payment between the conflicting claimants: *Held,* the issue raised by the intervener's pleadings is the proper one to be considered, and not that raised in the complaint, to which the defendant named therein has filed no answer.

2. **Evidence—Right to Cross-Examine Witnesses.**

Where a cause has been referred and regularly proceeded with before a commissioner to take depositions therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law.

3. **Same—Reference — Report of Referee — Deposition Stricken Out—Statutes.**

Where a commissioner to take depositions has, over the objection and exception of a party litigant, denied him the right of cross-examination of a witness of his opponent, and has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken out. C. S., 1820.

4. **Same—Motion.**

Where a motion to suppress a deposition is based upon an irregularity in the way in which it was taken, it should be supported by evidence *aliunde,* therein differing from the appellant's right to have testimony given in the direct examination of a witness taken by deposition suppressed for the refusal of the commissioner to permit him to cross-examine a witness of the opposing party, under his objection and exception duly taken and preserved.

5. **Same—Bills and Notes—Negotiable Instruments—Collateral—Liens.**

Where the note of a nonresident defendant has been attached in an action brought in the courts of this State, and an interpleader claims as a holder in due course, and makes it to appear that it was taken as collateral security to another note, it is a holder in due course only to the extent of its lien. C. S., 3007.

APPEAL by plaintiffs from *Stack, J.*, at February Term, 1927, of MOORE. New trial.

Action begun on 16 May, 1925, to recover of defendant, St. Mary's Oil Engine Company, a foreign corporation, the sum of $432, commissions due to plaintiffs as agents of defendant on sale of machinery.

Summons was served on said defendant by publication. By virtue of a warrant of attachment herein issued to him, the sheriff of Wake County levied upon and attached the indebtedness of M. C. Sorrell to said defendant, evidenced by his note for $1,440, dated 18 July, 1924, and due and payable on or before 18 July, 1925, to the order of St. Mary's Oil Engine Company.

Thereafter, Central Trust Company of St. Charles, Missouri, intervened in the action, and was made a party defendant.

No answer to the verified complaint of plaintiffs was filed by defendant, St. Mary's Oil Engine Company. The intervener, Central Trust Company, filed an answer in which it denied that the garnishee, M. C. Sorrell, was indebted to the St. Mary's Oil Engine Company on his note for $1,440 at the date on which the attachment was levied; it alleged that it had purchased said note from said St. Mary's Oil Engine Company on 16 January, 1925, for a valuable considerable, and that said company had transferred and assigned said note to it, by endorsing same.

After the pleadings were filed, by consent, the garnishee, M. C. Sorrell, paid into court the amount of his indebtedness on his note payable to the order of St. Mary's Oil Engine Company, and was discharged of all further liability thereon. The intervener contended that it was the owner of the funds in the hands of the court, the same being the proceeds of the Sorrell note.

The only issue submitted to the jury was answered as follows:

"Is the intervener, Central Trust Company of St. Charles, Missouri, the owner of the funds paid into court on the M. C. Sorrell note? Answer: 'Yes.'"

From judgment on this verdict, plaintiffs appealed to the Supreme Court.

Hoyle & Hoyle for plaintiffs.
U. L. Spence for intervener.

CONNOR, J. There was no prejudicial error in the refusal of the court to submit the issue tendered by plaintiffs, although it was the issue raised by the pleadings. The garnishee paid the amount of his indebtedness on the note into court, after the pleadings had been filed; the matter in controversy, therefore, at the trial was the ownership of the funds then in the hands of the court. The issue as submitted by the court was sufficient in form to enable the parties to present to the jury their contentions as to every phase of the matter to be determined by them. The assignment of error, with respect to the issues, is not sustained. *Power Co. v. Power Co.,* 171 N. C., 248.

The burden of the issue to be answered by the jury was upon the interveners. It has been repeatedly so held by this Court. *Sitterson v. Speller,* 190 N. C., 192; *Electric Co. v. Light Plant,* 185 N. C., 534; *Sterling Mills v. Milling Co.,* 184 N. C., 461; *Mangum v. Grain Co.,* 184 N. C., 181; *Moon v. Milling Co.,* 176 N. C., 407; *Cotton Mills v. Weil,* 129 N. C., 452. In support of this burden, the intervener offered in evidence depositions of three witnesses, taken before a notary public, at St. Charles, Missouri. C. S., 1809. Plaintiff offered no evidence.

J. C. Willbrand, vice-president and secretary and treasurer of the intervener, in his deposition, testified that the intervener purchased the note of M. C. Sorrell, payable to St. Mary's Oil Engine Company, for $1,440, on 15 January, 1925, paying full value therefor; that the note, endorsed by the payee, was entered on a deposit slip, and tendered to the Central Trust Company by St. Mary's Oil Engine Company, for deposit to its credit; and that the deposit was accepted by Central Trust Company, and credit given to St. Mary's Oil Engine Company for the full face value of the note. No inquiry was made by Central Trust Company as to the solvency of M. C. Sorrell, maker of the note. The Central Trust Company has owned the note since 15 January, 1925.

On the cross-examination of this witness, the following questions were addressed to this witness by the attorney for plaintiffs:

"Q. Do I understand you to say that the Central Trust Company is bearing the entire cost of this litigation? A. I do not know about that; we are at the present time.

"Q. Who is, eventually? A. I suppose if we do not come out whole, it will go back on the St. Mary's Oil Engine Company. I had not thought of that feature. We were put on notice of the attachment in North Carolina about two or three weeks before the maturity of the note, I think. I communicated this to the St. Mary's Oil Engine Company. It told us to go ahead and fight the litigation; that it was our note.

"Q. And that was the first time that anything had been said about that being your note, wasn't it? A. You mean between us and the St. Mary's Oil Engine Company?

"Q. At any time? A. We took the note, and considered it our note.

"Q. The reason you considered it your note was because you took it for deposit? A. Bought it; yes.

"Q. In case the plaintiffs are successful in this action, you will charge the loss that you have, plus lawyers' fees, back to St. Mary's Oil Engine Company, will you not?"

Objection to this question was entered by the attorney for intervener, who advised the witness not to answer the question.

"A. I refuse to answer the question.

"Q. We will have to insist on your answering it, Mr. Willbrand. I ask the commissioner to compel the witness to answer the question."

The commissioner: "I think the objection raised by the attorney for defendant is well taken; at the time the depositions are read into the record in the court in North Carolina, the attorney for the plaintiff can then bring in his reasons why the witness should have answered the question; the commissioner's ruling is that the witness does not have to answer the question. This ruling will be reviewed by the trial judge."

"Q. (Addressed to the witness.) Is the ground of your refusal to answer the question that the answer would tend to incriminate or degrade you? A. (By attorney for intervener.) No.

"(By witness.) My counsel says 'No,' I guess I'll say 'No.' The question as to whether or not the Central Trust Company will bear the ultimate loss, if any, has never been discussed."

Before the taking of the depositions was closed, and while the witness J. C. Willbrand was still present before the commissioner, counsel for plaintiffs moved the commissioner to compel the witness to answer the question propounded to him, which the witness, under advice of counsel for intervener, had refused to answer. The motion was denied. Counsel for plaintiffs thereupon gave notice, as appears in the record, that at the trial of the action in the Superior Court of Moore County, North Carolina, plaintiffs would move the court to strike out and disallow the deposition of J. C. Willbrand, if offered as evidence in behalf of Central Trust Company, and to strike out and dismiss the interplea of said company in this action.

At the trial in the Superior Court of Moore County, after the jury had been empaneled, plaintiffs moved the court to strike out the interplea of Central Trust Company, and the deposition of J. C. Willbrand, offered as evidence by the intervener, because of the refusal of J. C. Willbrand, under the advice of counsel for intervener, to answer the questions propounded to him on cross-examination, as shown in the deposition.

The record showed that this deposition was received and filed by the clerk of the Superior Court of Moore County, on 5 February, 1926, and was opened by the said clerk, in the presence of attorneys for plaintiff and intervener on 11 May, 1926, subject to such exceptions thereto as might thereafter be filed.

The motions of plaintiff were denied, and plaintiff excepted. Their second assignment of error is based upon this exception.

It is provided by statute in this State that no deposition shall be quashed or rejected on objections first made after the trial has begun merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before trial to enable him to present his objection. C. S., 1820. In *Freeman v. Brown,* 151 N. C., 111, the defendant objected to and moved to suppress a deposition offered in evidence by the plaintiff, for that same was taken before issue was joined in the action, in that the answer had not been filed at the time the deposition was taken. The motion was denied. Defendant's exception was not sustained, this Court, in the opinion written by *Manning, J.,* saying: "The motion to suppress the deposition ought to have been made, at latest, before the trial was entered upon. Rev., 1647 (now C. S., 1820); *Ivey v. Cotton Mills,* 143 N. C., 189." The reason for the statute, as stated by *Walker, J.,* in *Ivey v. Cotton Mills, supra,* is to provide that the party in whose behalf the deposition has been taken shall have notice of the objection, and of the grounds for same, and not be taken at a great disadvantage by going to trial without such notice. This reason does not apply in the instant case, for the intervener had ample notice of the motion of plaintiff's and of the grounds upon which it was made. These grounds appear in the face of the deposition. No extrinsic evidence in support of or in opposition to the motion was required. The deposition itself disclosed the grounds for the motion. It was made in apt time. Objections to questions and answers contained in the deposition upon the ground that they are incompetent are heard at the trial. *Jeffords v. Waterworks Co.,* 157 N. C., 10. An objection for that the deponent has refused to answer a question propounded to him on cross-examination, and that the commissioner or notary public has declined to require the witness to answer, may be first presented at the trial, where notice of such objection was given during the taking of the deposition, as appears upon its face. The objection is not made because of an irregularity in the taking of the deposition, which must be shown by evidence *aliunde,* as was the case in *Williford v. Bailey,* 132 N. C., 402, where the objection to the deposition was on the grounds that the witness was a resident of the county, that no commissioner was named in the notice, and that no notice was given before the appointment of the commissioner. In that case the Court said: "If there be any merit to these objections, the objection should have been made in writing, and should have been passed on before the trial began. *Davenport v. McKee,* 98 N. C., 500; *Brittain v. Hitchcock,* 127 N. C., 400." In *Hudson v. R. R.,* 176 N. C., 488, it was held that a motion to strike out the answers of a witness to questions propounded to him on his cross-examination, as shown by his deposition, first made at the trial, came too late. In that case, however, the deposition did not show that there was an objection to the answer, or a motion to strike same out, made during the taking of the deposition, as in the instant case.

It is manifest that plaintiffs have been denied, by the ruling of the commissioner or notary public, made at the instance of counsel for intervener, the right to a full cross-examination, upon a material matter, of the witness, upon whose testimony, offered by deposition, the intervener principally relies to sustain its contentions upon the issue to be answered by the jury. Plaintiffs are entitled to an opportunity to cross-examine this witness to show, if they can, that the intervener received and held the Sorrell note, not as a holder in due course, as intervener contends, but as an agent for collection, under the rule stated by this Court in *Worth v. Feed Co.,* 172 N. C., 335. It is said in the opinion in that case, written by *Allen, J.:* "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper, and places the amount, less the discount, to the credit of the endorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement, or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection, and not a purchaser." *Trust Co. v. Trust Co.,* 190 N. C., 468; *Bank v. Monroe,* 188 N. C., 446; *Finance Co. v. Cotton Mills,* 187 N. C., 233; *Sterling Mills v. Milling Co.,* 184 N. C., 461; *Temple v. La Berge,* 184 N. C., 252; *Markham-Stephens Co. v. Richmond Co.,* 177 N. C., 364. Plaintiffs were entitled to an opportunity to cross-examine the witness, and to have his answers to material questions propounded to him on his cross-examination, for the consideration of the jury. 18 C. J., 692, sec. 221.

Plaintiffs, residents of this State, in order to avail themselves of their right to be present at the taking of the depositions, to be used as evidence against them on the trial of their action in the courts of this State, and to cross-examine witnesses whose testimony was to be taken by deposition, for submission to the jury as evidence, were required to go, at great expense and inconvenience, to a distant state. The notary public, by his ruling, at the instance of counsel for the intervener, has deprived plaintiffs of a right which the courts of this State have held to be essential for their protection—the right to cross-examine adverse witnesses. *Moss v. Knitting Mills,* 190 N. C., 644. In *Milling Co. v. Highway Commission,* 190 N. C., 692, this Court has said, in its opinion written by *Varser, J.:* "The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief is an absolute right, and not a mere privilege. *S. v. Hightower,* 187 N. C., 300; *Mining Co. v. Mining Co.,* 129 Fed., 668. Cross-examination 'beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated.'"

Plaintiff's motion to suppress the deposition, made in apt time, after full notice to intervener, upon grounds stated in the record during the taking of the deposition, should have been allowed. The assignment of error based upon exception to the refusal of this motion is sustained.

The motion to strike out the interplea was addressed to the discretion of the court, and its denial of said motion upon the facts is not reviewable. It did not appear that the action of the notary public, or of counsel for the intervener, which resulted in the denial of plaintiff's right to cross-examine the witness, was in contempt of court, or was prompted by any wrongful or ulterior purpose. *Lumber Co. v. Cottingham,* 168 N. C., 544. On the contrary, such action seems to have been due to an erroneous conception of the duty of the notary public, with respect to the taking of the deposition.

It appears from the testimony of J. C. Willbrand, elicited upon his cross-examination, and from the testimony of other witnesses, whose depositions were taken in behalf of the intervener, that the Central Trust Company received and held the Sorrell note, together with other notes, as collateral security for a note executed by Mrs. Lona Anderson, wife of the president of St. Mary's Oil Engine Company. The proceeds of this note were deposited to the credit, not of Mrs. Anderson, the maker, but of the St. Mary's Oil Engine Company.

If the jury should find from the evidence that the Central Trust Company held the Sorrell note as security, then it was the holder thereof for value only to the extent of its lien. C. S., 3007. It would be the owner only of so much of the funds in the hands of the court as was required to pay the balance due on Mrs. Anderson's note to the bank. The excess would be subject to attachment in this action as the property of defendant, St. Mary's Oil Engine Company, if the Sorrell note was transferred to Central Trust Company by the St. Mary's Oil Engine Company as security for Mrs. Anderson's note. There was evidence that the Sorrell note was assigned by the Oil Engine Company to Mrs. Anderson and by her to the bank as security for her note. There was no evidence, however, that Mrs. Anderson paid anything to the Oil

Engine Company for the Sorrell note, making her a purchaser of the note for value. An inference to the contrary is permissible. There was no evidence from which the jury could find the amount now due to Central Trust Company on the Anderson note.

For error, as appears in this opinion, plaintiffs are entitled to a New trial.

JOHN M. QUEEN v. THE BOARD OF COMMISSIONERS OF THE COUNTY OF HAYWOOD.

(Filed 25 May, 1927.)

1. **Constitutional Law—Courts—Statutes—Repeal.**

Where the Legislature, in contravention of Art. II, sec. 29, of the Constitution of this State, has established a court inferior to the Superior Court, an incumbent judge thereof, duly elected, may not successfully contend that he was deprived of the emoluments of his office by an unconstitutional statute abolishing the court.

2. **Same—Property—Vested Rights.**

Where the Legislature has abolished a court inferior to the Superior Courts of this State, the incumbent judge takes subject to this legislative right, and cannot successfully maintain that during the term of his office he has been thus deprived of his right of property guaranteed him by Art. IV, sec. 30, of our Constitution.

APPEAL by plaintiff from *Stack, J.*, at May Term, 1927, of HAYWOOD. Affirmed.

This is a controversy without action. The following are the facts agreed:

1. On 3 December, 1924, the board of commissioners of Haywood County, acting under authority of C. S., 1536 to 1608, inclusive, and acts amendatory thereof, established a recorder's court for Haywood County, and fixed the recorder's salary at two hundred dollars per month. Thereafter, to wit, at the next regular election for county officers, in November, 1926, the plaintiff was duly elected recorder of said court for the two-year term beginning the first Monday in December, 1926, and the plaintiff, on the last-named date, duly qualified by taking the oath prescribed by law, and has since been acting as recorder of said court.

2. The defendant, the board of commissioners of Haywood County, are required by the provisions of C. S., 1565, to furnish the county courthouse, or other place within the county, for the sessions of said recorder's court. This duty they have heretofore and are now discharg-

ing according to law, by furnishing the county courthouse as a place wherein to hold said court.

3. The General Assembly of North Carolina, at its 1927 session, enacted the following law, known as House Bill No. 1308 and Senate Bill No. 1256:

A BILL TO BE ENTITLED AN ACT TO ABOLISH THE RECORDER'S COURT OF HAYWOOD COUNTY.

The General Assembly of North Carolina do enact:

SECTION 1. That the recorder's court of Haywood County be and the same is hereby abolished.

SEC. 2. That all the laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

SEC. 3. That this act shall be in force and effect from and after the first day of July, 1927, and all cases then pending in said court shall be transferred to the courts according to their respective jurisdiction.

4. Acting under color of authority of the said act of 1927, set out in paragraph 3 above, the defendants, acting as a board of commissioners lawfully assembled, on 3 May, 1927, passed the following order:

"Ordered, that to conform with the provisions of the act of 1927, abolishing the recorder's court of Haywood County, that on and after 1 July, 1927, the county courthouse shall not be used as a place wherein to hold any attempted session of said recorder's court, nor shall any other place within the county be provided for that purpose, nor shall any salary be paid the recorder for services performed as such after said date."

5. The plaintiff contends that the said act of 1927, set out in paragraph 3 above, is a local act, and is void, in that it is in contravention of that part of section 29 of Article II of the State Constitution, reading as follows:

"The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court, . . . nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private, or special laws enacted by it. Any local, private, or special act, or resolution, passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

6. The plaintiff further contends that the said act of 1927, set out in paragraph 3 above, in attempting to abolish the said recorder's court,

and thereby attempting to reduce the term for which the plaintiff has been duly elected, is void, in that it is in contravention of Article IV, section 30, of the State Constitution, reading as follows:

"In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years."

7. The plaintiff contends that the order set out in paragraph 4 above, denying to him the facilities for carrying on said recorder's court after 1 July, 1927, and denying to him any salary after said date, will prevent him from holding said court, and do him an irreparable injury; and is a threatened invasion of his rights, for which there is no adequate remedy at law; and plaintiff therefore prays for an order permanently restraining the defendants, the board of commissioners of Haywood County, from putting said order into effect, or in any way interfering with the lawful operation of said recorder's court.

8. The defendants contend that the said act of 1927, as set out in paragraph 3 above, is valid in all respects, and is sufficient authority for the passage of the order complained of, and they pray that this action be dismissed at the cost of the plaintiff.

The court below rendered the following judgment: "That the defendant, the board of commissioners for the county of Haywood, be not restrained from putting the order set out in paragraph 3 of the case agreed into effect; that is to say, be not restrained from denying the plaintiff the use of the county courthouse, or some other suitable place within the county, for the purpose of holding sessions of the recorder's court of Haywood County."

From the foregoing judgment plaintiff duly excepted, assigned error, and appealed to the Supreme Court.

Joseph E. Johnson and Alley & Alley for plaintiff.
Morgan & Ward and M. G. Stamey for defendant.

CLARKSON, J. Plaintiff contends, (1) the act was unconstitutional abolishing the county court of Haywood County, N. C. We cannot so hold.

"If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Sutton v. Phillips,* 116 N. C., at p. 504; *Hinton v. State Treasurer, ante,* at p. 499.

The court was originally established by the board of commissioners of Haywood County, on 3 December, 1924, under a general act, Laws

1919, ch. 277. "An act to establish uniform system of recorders' courts for municipalities and counties in the State of North Carolina." C. S., 1536 to 1608, inclusive; Public Laws 1921, ch. 110, and acts amendatory.

The provision of the Constitution necessary for a decision is part of sec. 29, Art. II, State Constitution. The material part: "The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court."

The general act was passed, Public Laws 1919, ch. 277, and Haywood County was not included in the general act, nor was it included in amendatory act of 1921, ch. 110. At Extra Session 1921, Public Laws, ch. 80, the amendatory act of 1921 was amended by inserting Haywood County, with Jackson and Swain. Under legislative authority establishing the court, the same power and in practically the same manner that created the court, the Legislature at 1927 session abolished the court. Plaintiff's title to his office is under authority of a legislative act, the amendment inserting Haywood County, and the same authority, by amendment as it were, abolishes the court and his office. If the Legislature had the right to create the court, it had the right to abolish. *Quo ligatur, eo dissolvitur.* By the same mode by which a thing is bound, by that it is released.

If the act inserting Haywood County, with others, was unconstitutional, the act abolishing it was only declaratory of the existent law, so Haywood County had no constitutional recorder's court—plaintiff could not complain.

Speaking to the subject *In re Harris,* 183 N. C., p. 633, in that case the acts now discussed were construed. Under Laws 1921, ch. 110, *supra,* Iredell, Granville, and Cherokee counties were inserted under the county court act, and under the authority a recorder's court established for Iredell County. Harris was convicted of a misdemeanor and sentenced to imprisonment for a term of 6 months, to be assigned to work on the roads, etc. He sued out a writ of *habeas corpus,* alleging the judgment illegal and void, "chiefly for the reason that the act providing for the establishment of said court, and conferring jurisdiction thereon, was in violation of Art. II, sec. 29, of the Constitution, prohibiting local, private, or special legislation in various matters therein specified, and including acts relating to the establishment of courts inferior to the Supreme Court. On the hearing, his Honor being of opinion that the act was in all respects constitutional and valid, entered judgment in denial of plaintiff's application, and he was remanded to custody, and is now held under said sentence of the recorder's court. Thereupon said petitioner applied for and obtained this writ of *certiorari,* on petition, and which was duly filed and served for the purpose, as stated, of reviewing the adverse judgment in *habeas corpus* proceedings, and the validity of the sentence under which the petitioner is being detained." After a full discussion, citing authorities, this Court said (at p. 637): "For the reasons stated, we are of opinion that the petitioner is held under a valid sentence of a competent court, and the judgment denying his application for release must be affirmed." *Roebuck v. Trustees,* 184 N. C., 144; *Coble v. Comrs.,* 184 N. C., 342; *S. v. Kelly,* 186 N. C., 365; *Reed v. Engineering Co.,* 188 N. C., 39; *Provision Co. v. Daves,* 190 N. C., 7; *Ellis v. Greene,* 191 N. C., 761; *Day v. Comrs., ibid.,* 780.

"The prohibition is against the *establishment* of courts inferior to the Superior Court by any local, private, or special act or resolution." *Provision Co. case, supra.*

Plaintiff contends, (2) that the act of 1927, abolishing the recorder's court of Haywood County, violates Art. IV, sec. 30, of the Constitution, which reads as follows: "In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding 8 years." We cannot so hold.

In the famous case of *Mial v. Ellington,* 134 N. C., p. 131, in which *Hoke v. Henderson,* 15 N. C., p. 1, was overruled, it was held: "An officer appointed for a definite time to a legislative office has no vested property therein or contract right thereto of which the Legislature cannot deprive him."

The courts we are now considering are the creatures of the Legislature. The creator can establish and abolish.

The *Mial case, supra,* has been approved time and time again, and recently in *S. v. Jennette,* 190 N. C., p. 96.

The positions taken by plaintiff are interesting, but untenable from the decisions of this Court. The law is well settled against his contentions.

The judgment below is
Affirmed.

HAYDEN CLEMENT, TRUSTEE, ET AL. v. J. F. HARRISON ET AL.

(Filed 25 May, 1927.)

Records—Deeds and Conveyances—Index Book—Registration—Mortgages —Liens—Priority of Lien—Statutes.

The requirements of C. S., 3560, as to the indexing of deeds and conveyances by the register of deeds of the proper county, among other things, under the proper initial letters of the surname of the grantors, etc., does not extend to instances where these index books have been provided for the register of deeds with further subdivisions of the letters, alphabetically arranged, and where a mortgage has been registered under its appropriate letter, as the statute requires, it will not lose its priority of lien, because not placed under the alphabetical subdivision of the letter.

CIVIL ACTION, before *McElroy, J.*, at November Term, 1926, of ROWAN.

The judgment containing the findings of fact pertinent to the controversy is as follows: "It appearing to the satisfaction of the court that the plaintiffs caused a restraining order to be issued against B. A. Fisher, trustee, Bank of Rockwell, G. R. Uzzell, and others, to restrain a sale of the property described in the pleadings, pursuant to the terms of a mortgage trust deed executed by J. F. Harrison and wife, Mamie E. Harrison, to B. A. Fisher, trustee, for the Bank of Rockwell, and that the sale took place on 13 November, 1926, and that the real estate was bid in by G. R. Uzzell at the price of $1,700, and that the sale was left open for an increased bid, and that during the time between the day of sale and time allowed by law for increased bid the plaintiffs caused a restraining order to be issued against the defendants, as set out in the pleadings.

"The court finds the following facts, to wit:

"1. That the register of deeds of Rowan County has in his office an alphabetical index to real estate mortgages with a subdivision of each letter showing the alphabetical letter next in order to the title letter, beginning with 'A' and ending with 'Z,' and that the index was introduced in evidence, and that the alphabetical index to mortgages mentioned above under the letter 'H' is subdivided as follows: (1) 'Haa' to 'Hap,' (2) 'Har' to 'Haz,' (3) 'He,' (4) 'Hi,' (5) 'Ho,' (6) 'Hu' to 'Hy.'

"2. That on 16 January, 1919, J. F. Harrison and wife, Mamie E. Harrison, executed a deed of trust on the real estate in controversy to Hayden Clement, trustee, which mortgage deed of trust was registered in Book of Mortgages No. 63, page 153, register's office of Rowan County, but this mortgage, or mortgage trust deed, was indexed under the subdivision of 'Haa' to 'Hap,' and not under the subdivision of 'Har' to 'Haz.'

"3. That on 20 August, 1923, J. F. Harrison and wife, Mamie E. Harrison, executed a mortgage trust deed to B. A. Fisher, trustee, to secure the sum of $1,600 due the Bank of Rockwell, and this mortgage trust deed is registered in Book of Mortgages No. 85, page 284, in the office of the register of deeds of Rowan County, and is indexed under the alphabetical subdivision of 'Har' to 'Haz.'

"4. The defendants B. A. Fisher, trustee, and the Bank of Rockwell caused the real estate described in the mortgage executed by J. F. Harrison and wife to be advertised according to the terms of the mortgage, and sold the same at public auction on 13 November, 1926, and that said property was bid in by G. R. Uzzell at the price of $1,700.

"5. That the real estate described in the mortgage trust deed from J. F. Harrison and wife, Mamie E. Harrison, to Hayden Clement, trustee, is the same property as described in the mortgage trust deed from J. F. Harrison and wife, Mamie E. Harrison, to B. A. Fisher, trustee.

"The defendants B. A. Fisher, trustee, Bank of Rockwell, and G. R. Uzzell moved to dismiss and discharge the restraining order issued in this case, for the reason that the mortgage trust deed executed by J. F. Harrison and wife, Mamie E. Harrison, to Hayden Clement, trustee, was not properly indexed, as required by law, and was not under the proper alphabetical subdivision of the letter 'H.' The plaintiffs resisted the motion, and contended that the index does not constitute a material part of the registration, and further contended that the mortgage trust deed executed by J. F. Harrison and wife to Hayden Clement, trustee, was duly registered and was properly indexed, although it was not indexed under the subdivision of 'Har' to 'Haz,' and contended that while it was indexed under the subdivision of 'Haa' to 'Hap,' the index was sufficient.

"After hearing the argument, pro and con, the court is of opinion, and so finds:

"That the index of the mortgage from J. F. Harrison and wife to Hayden Clement, trustee, under the subdivision of 'Haa' to 'Hap' is a substantial compliance with section 3561, and is a sufficient indexing, and that it was not necessary for the mortgage trust deed to Hayden Clement, trustee, to be indexed under the subdivision of 'Har' to 'Haz,' and that the mortgage was properly indexed, and continues the restraining order issued in this case."

From the foregoing judgment the defendant appealed.

Clement & Clement and Hudson & Hudson for plaintiff.
R. Lee Wright for defendant.

BROGDEN, J. The question is this: Is a mortgage or deed of trust, which has been duly and properly registered and indexed under the "appropriate letter of the alphabet," invalid by reason of the failure of the register of deeds to index the mortgage under a subdivision or catch-head of the "appropriate letter of the alphabet"? Or, to state the proposition differently, would a mortgage or deed of trust so registered take priority over a subsequent mortgage or deed of trust properly indexed and registered under the subdivision or "catch-head" of the appropriate letter of the alphabet?

It appears from the judgment in this case that the register of deeds of Rowan County kept in his office an alphabetical index to real estate mortgages. The letter "H" in such index is subdivided as follows: "Haa" to "Hap." "Har" to "Haz." "He." "Hi." "Hu" to "Hy." As the mortgage in controversy was executed by the defendants J. F. Harrison and wife, it was necessary to index and cross-index this instrument under the "appropriate letter of the alphabet," which, of course, was the letter "H." Under the subheads of the index, kept by the register of deeds, this mortgage or deed of trust should have been indexed under the subhead "Har" to "Haz," but as a matter of fact it was actually indexed under the subdivision of "Haa" to "Hap." If the indexing and cross-indexing of this deed of trust under the wrong subdivision is invalid, then the plaintiff has lost his lien securing the payment of the sum of $1,350, evidenced by the notes described in the deed of trust.

The indexing of deeds and deeds of trust and mortgages is an essential part of the registration thereof. *Ely v. Norman,* 175 N. C., 298; *Fowle v. Ham,* 176 N. C., 12; *Mfg. Co. v. Hester,* 177 N. C., 609; *Wilkinson v. Wallace,* 192 N. C., 156.

Our case presents the question as to what constitutes sufficient indexing and cross-indexing. C. S., 3560 and 3561, contain the statutory essentials of sufficient indexing and cross-indexing. C. S., 3561, provides: "The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds, and other instruments of writing required or authorized to be registered; such indexes to be kept in well-bound books, and shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors, or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and reference shall be made, opposite each name, to the page, title, or number of the book in which is registered any instrument. A violation of this section shall be a misdemeanor." C. S., 3560, apparently contemplates that the index provided by the county commissioners shall be one book, constituting a general index of all instruments admitted to registration or required to be registered. The only requirement of cross-indexing specified in the statute is that such index and cross-index shall "show the name of each party under the appropriate letter of the alphabet, and reference shall be made opposite each name to the page, title, or number of the book in which is registered any instrument."

The deed of trust in controversy was properly registered in a book containing real estate conveyances. It was indexed and cross-indexed under the letter "H," which is the "appropriate letter of the alphabet," and the cross-index referred to the page, title, or number of the book in which the instrument had been duly registered. The statute, upon its face, apparently does not contemplate the division of the index into subheads. This division of the index into subheads has been installed in many counties for the convenience of parties who are compelled to examine the public records. Undoubtedly the method of subdividing the index is modern and efficient, and relieves the members of the profession particularly from a vast amount of unnecessary labor in passing upon titles; but, under the statute, as written, the only requirement is that the instrument should be indexed and cross-indexed under the "appropriate letter of the alphabet." This has been done. As to whether the statute should be amended so as to include "catch-heads" or subdivisions of the appropriate letter is not a matter for us to determine. It is our duty to construe the law as it is written. In the recent case of *Bank v. Harrington,* decided 27 April, 1927, the Court was evenly divided upon the question as to whether a real estate mortgage registered in a chattel mortgage book and cross-indexed on a chattel mortgage index was a sufficient registration of the instrument. There is a wide and fundamental difference between this case and the *Harrington case* referred to. In this case the deed of trust was recorded in the proper book. It was indexed on the general index for real estate conveyances, and furthermore, it was indexed and cross-indexed under the appropriate letter of the alphabet.

We therefore concur with the trial judge, declaring that the instrument was sufficiently registered and indexed so as to constitute a lien upon the land.

Affirmed.

R. H. WELCH v. DORA GRICE NEWBERN ET AL.

(Filed 23 February, 1927.)

APPEAL by defendants from *Nunn, J.,* at September Term, 1926, of PASQUOTANK.

Controversy without action, to determine validity of title to a tract of land, submitted on an agreed statement of facts.

Aydlett & Simpson for plaintiff.
Thos. J. Markham for defendants.

PER CURIAM. This is a controversy without action, to settle the title to a tract of land, submitted on an agreed statement of facts, but as the facts appearing of record are not sufficiently full to warrant the Court in determining the question—in that, it is not specifically stated whether the West End Land and Improvement Company ever sold any lots with reference to the map recorded in Book 27, at page 526, upon which the word "Park" appears—the cause is remanded to the Superior Court of Pasquotank County for further proceedings in accordance with the usual course and practice in such cases.

Remanded.

BOARD OF DRAINAGE COMMISSIONERS OF PANTEGO RUN DISTRICT, BEAUFORT COUNTY DRAINAGE DISTRICT No. 14, v. J. A. WILKINSON.

(Filed 23 February, 1927.)

APPEAL by defendant from *Daniels, J.,* 19 January, 1927, BEAUFORT Superior Court. Affirmed.

Tooly & McMullan for plaintiff.
Small, McLean & Rodman for defendant.

PER CURIAM. From an examination of the record we think the statute has been substantially complied with. We see no reason why the legislative ratification is not substantially sufficient. *Board of Education v. Comrs.,* 183 N. C., p. 302; *Construction Co. v. Brockenbrough,* 187 N. C., p. 77; *Storm v. Wrightsville Beach,* 189 N. C., at p. 683.

We can find no prejudicial or reversible error. The judgment below is

Affirmed.

CORNELIA T. JESSUP ET AL. v. THOMAS NIXON.

(Filed 23 February, 1927.)

APPEAL by defendant from *Grady, J.,* at August Special Term, 1926, of PERQUIMANS.

Motion by defendant for judgment dismissing the action at the cost of the plaintiffs, in accordance, as he contends, with the opinion of the Supreme Court, rendered 19 September, 1923, and duly certified to the Superior Court of Perquimans County. From an order denying this motion and leaving the cause on the docket for trial, the defendant appeals, assigning error.

McMullan & Leroy and Ehringhaus & Hall for plaintiffs.
Whedbee & Whedbee, H. S. Ward, S. C. Bragaw and Thompson & Wilson for defendant.

PER CURIAM. This case was before us at the Fall Term, 1923, and is reported in 186 N. C., 100. The defendant's exception to the refusal of the trial court to grant his motion for judgment as of nonsuit was duly presented on the original hearing, but was not sustained. Certain peremptory instructions were held to be erroneous. Hence, the necessary effect of the rulings was to remand the cause for a new trial, the appeal being from a judgment rendered on a verdict of the jury, and the demurrer to the evidence not being sustained.

Affirmed.

CONNOR, J., did not sit.

W. L. BOSWELL, E. L. BOSWELL, FARMERS PEANUT COMPANY, AND W. S. PRIVOTT, TRUSTEE, v. R. E. CHAPPELL AND H. R. LEARY, TRUSTEES.

(Filed 23 February, 1927.)

APPEAL by plaintiffs from *Nunn, J.,* at December Term, 1926, of CHOWAN. Reversed.

Action by plaintiffs against defendants to cancel certain notes secured by deed of trust to defendant, H. R. Leary, trustee, on the ground that they were paid, and to have said trustee to cancel said deed of trust in the office of the register of deeds of Chowan County, N. C., for restraining order, etc.

Upon motion of defendants, the court below rendered judgment as in case of nonsuit against plaintiffs and they assigned error and appealed to the Supreme Court.

P. W. McMullan and W. D. Pruden for plaintiffs.
Lloyd Griffin and Ehringhaus & Hall for defendants.

PER CURIAM. The evidence is to be taken in the light most favorable to plaintiffs, and they are entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

We think there was sufficient evidence, more than a scintilla, to be submitted to the jury as to payment of the notes. As the case goes back to be heard before a jury, we will not set out the evidence.

For the reasons given the judgment is

Reversed.

CATHARINE W. BROWN v. E. F. AYDLETT ET AL.

(Filed 23 February, 1927.)

APPEAL by plaintiffs from *Nunn, J.*, at September Term, 1926, of PASQUOTANK.

Civil action to restrain the foreclosure of a deed of trust, it being alleged by the plaintiffs and denied by the defendants that the notes, secured by said deed of trust, have been paid, or that the balance due thereon, if any, cannot be ascertained until the controversy between P. H. Williams, receiver, and Catharine W. Brown, administratrix, as to the ownership of said notes is determined, which said controversy is now pending in the Superior Court of Pasquotank County.

From a judgment dissolving the temporary restraining order issued herein, but continuing the same until the matter could be passed upon by the Supreme Court, the plaintiffs appeal, assigning error.

W. L. Small and Ehringhaus & Hall for plaintiffs.
P. H. Bell for defendants.

PER CURIAM. It appearing that a serious controversy exists between the parties, and that no harm can result from continuing the restraining order to the hearing, while a contrary ruling might work serious injury to the plaintiffs, we are of opinion that under authority of *Wentz v. Land Co., ante,* 32, and cases there cited, the restraining order should have been continued to the final hearing.

Error.

J. B. COLT CO., INC., v. J. W. TARKENTON.

(Filed 2 March, 1927.)

APPEAL by plaintiff from *Calvert, J.*, at August Term, 1926, of BERTIE.

Civil action to recover on two promissory notes. The execution of the notes was admitted, but the defendant set up a counterclaim for breach of warranty in the sale of the goods for which the notes were given; whereupon issues were submitted to the jury and answered as follows:

"1. In what sum, if any, is the defendant indebted to the plaintiff on the notes sued on? Answer: $211.40, with interest on $68.20 from 1 November, 1923, and with interest on $143.20 from 1 November, 1924.

"2. Did the plaintiff warrant the generator to be automatic in action and of good material and workmanship, as alleged by the defendant? Answer: Yes.

"3. Was there a breach of said warranty as alleged by the defendant? Answer: Yes.

"4. If so, what damages, if any, is the defendant entitled to recover of the plaintiff because of such breach of warranty? Answer: $286.40, with interest."

From a judgment on the verdict in favor of the defendant for $75.00 and interest, the plaintiff appeals, assigning errors.

Craig & Pritchett for plaintiff.
Winston, Matthews & Kenney for defendant.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible or prejudicial error.

The exceptions relating to the admission and exclusion of evidence, and those to the charge, including exception to the prayer for special instruction tendered and refused, must all be resolved in favor of the validity of the trial; the case presents no new question of law, or one not heretofore settled by our decisions; the verdict and judgment will be upheld.

No error.

STATE v. RAY HUNT.

(Filed 2 March, 1927.)

APPEAL by defendant from *Sinclair, J.*, at March Term, 1926, of LEE.

Criminal prosecution tried upon an indictment charging the defendant with manufacturing spirituous liquors in violation of law.

From an adverse verdict and judgment of eighteen months on the roads the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
Hoyle & Hoyle for defendant.

PER CURIAM. We are unable to say, from the record as presented, that the irregularities in the selection of the juries, grand and petit, of which the defendant complains, were such as could not be waived, but may now be invoked and brought to the aid of the defendant on his motion in arrest of judgment.

The defendant was not represented by counsel at the trial, and his appeal is from the court's refusal to arrest the judgment. The irregularities were not sufficient to vitiate the trial.

Affirmed.

STATE OF NORTH CAROLINA ON RELATION OF NORTH CAROLINA CORPORATION COMMISSION, v. HARNETT COUNTY TRUST COMPANY (A CORPORATION).

(Filed 2 March, 1927.)

APPEAL by B. P. Gentry *et al.* from *Cranmer, J.*, at November Term, 1926, of HARNETT. Appeal dismissed.

Clifford & Townsend and Charles Ross for appellants.
A. A. F. Seawell and K. R. Hoyle for appellees.

PER CURIAM. The appellants entered a special appearance and moved that as to them the action be dismissed. The motion was denied, and they excepted and appealed.

The appeal must be dismissed. It is fragmentary and premature. An appeal from an interlocutory order will not ordinarily be entertained. *Watts v. Staton,* 191 N. C., 215; *Bradshaw v. Bank,* 172 N. C., 632; *Mann v. Gibbs,* 156 N. C., 44; *Turner v. Holden,* 109 N. C., 182; *Guilford v. Georgia Co., ibid.,* 310.

Appeal dismissed.

CLAUD GREENE v. VANN & BROTHER.

(Filed 2 March, 1927.)

CIVIL ACTION, before *Calvert, J.*, at October Term, 1926, of HERTFORD.

This was an action for damages for unfair competition.

The issues and answers of the jury thereto were as follows:

1. Did the defendants wilfully injure or undertake to destroy or injure the business of plaintiff with the purpose or intention of attempting to fix the prices of the commodities referred to when the competition was removed? Answer: No.

2. If so, what actual damages, if any, has plaintiff sustained by reason of same? Answer: ....

Upon the verdict judgment was entered in favor of defendants, and the plaintiff appealed.

J. C. B. Ehringhaus, Bridger & Eley and Craig & Pritchett for plaintiff.

W. W. Rogers, W. H. S. Burgwyn and Stanley Winborne for defendants.

PER CURIAM. This controversy in its final analysis involves issues of fact only. The jury found the facts against the plaintiff upon a fair and proper charge by the court. All errors assigned by the plaintiff have been carefully examined, and upon the whole record we find no error of law warranting a new trial. The judgment is therefore

Affirmed.

J. A. PURVIS v. J. W. BEAN.

(Filed 9 March, 1927.)

APPEAL by defendant from *Cranmer, J.*, at August Term, 1926, of CHATHAM.

Civil action to recover damages for the alleged seduction of plaintiff's minor daughter.

From a verdict and judgment in favor of plaintiff the defendant appeals, assigning errors.

Siler & Barber for plaintiff.

C. N. Cox and Long & Bell for defendant.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case was heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible or prejudicial error. The case presents no new question of law, or one not heretofore settled by our decisions. *Tillotson v. Currin*, 176 N. C., 479.

The verdict and judgment will be upheld.

No error.

F. S. ROYSTER GUANO COMPANY, INC., AND BLOUNT-HARVEY COMPANY, INC., v. L. W. WILSON AND WIFE, MAGGIE WILSON.

(Filed 16 March, 1927.)

APPEAL by plaintiffs from *Sinclair, J.*, at September Term, 1926, of PITT. Affirmed.

Blount & James for plaintiffs.
F. C. James & Son for defendants.

PER CURIAM. This is an action by plaintiffs against defendants. The first cause of action is to recover the sum of $975.20 and interest from defendant, L. W. Wilson, on a note executed 18 January, 1922, to Blount-Harvey Company, or order, as agent for F. S. Royster Guano Company. The indebtedness was alleged to have been contracted in the year 1920 for fertilizer.

The second cause of action is to set aside a deed conveying three tracts of land, made by L. W. Wilson, 10 December, 1920, after the indebtedness was contracted, to his wife, Maggie Wilson, recorded in register of deeds office in Pitt County, Book S-13, p. 368, when heavily indebted at the time, same being fraudulent and void as to creditors and of no effect against plaintiffs.

The defendant, L. W. Wilson, in answer (1) Admits the debt; and in further answer says (2) that the deed to his wife was made for a valuable consideration; that the land was purchased with his wife's money and by inadvertence or oversight taken in his name. "And these defendants, both of them, most emphatically deny that the said conveyance of 10 December, 1920, was made to hinder, delay or defeat any of the rights of the plaintiffs or to defraud any one, but was made in furtherance of promises repeatedly made several years prior thereto to convey the lands to the said Maggie Wilson, the same having been purchased and paid for with funds belonging to her. . . . That the fact is that in January, 1921, the plaintiffs knew of the conveyance to Maggie Wilson on 10 December, 1920, and called it to the attention of the defendant L. W. Wilson, and asked him to give a new note and have his wife join with him in the execution, and that his wife at that time refused to sign any note whatsoever." (3) Pleads the statute of limitations: "That more than three years have elapsed since the execution and registration of the deed from L. W. Wilson to Maggie Wilson, dated 10 December, 1920, and recorded in Book S-13, page 368, and these defendants both plead the three-year statute of limitations in bar of any recovery of this action; that more than three years have elapsed since it came to the actual knowledge of the plaintiffs that the deed of 10 December, 1920, from L. W. Wilson to Maggie Wilson, recorded in Book S-13, p. 368, has been executed, and these defendants plead the three-year statute of limitations in bar of any recovery of this action."

Since the institution of the action, Maggie Wilson has died, and her children made parties. The minors are duly represented by guardian *ad litem.*

At the close of plaintiff's evidence the defendants made a motion for judgment as in case of nonsuit on the second cause of action, which the court below granted. The plaintiffs assigned error and appealed to this Court. Plaintiffs introduced the deed from L. W. Wilson to his wife, reciting a consideration of $3,000. We think, under all the facts and circumstances of this case, the nonsuit was properly granted. See *Latham v. Latham,* 184 N. C., p. 55. The judgment below is

Affirmed.

BURKE HEAD v. L. H. HEAD.

(Filed 23 March, 1927.)

APPEAL by defendant from *Daniel, J.,* WAYNE Superior Court. Affirmed.

D. C. Humphrey for plaintiff.
Wyatt E. Blake for defendant.

PER CURIAM. This is a submission of controversy without action. The sole question to be determined: Does Burke Head own said lands in fee, subject to the life estate of Lizzie Head therein, or does he own only a life estate therein subject to a life estate of Lizzie Head therein?

The judgment of the court below was as follows: "It is thereupon considered and adjudged by the court that Burke Head owns said land in fee, subject to the life estate of Lizzie Head." The construction of the deed given by the court below we think correct, from the language and intention gathered from the entire instrument.

We think the decision of the court below in accordance with the authorities in this State. There is no new or novel proposition of law involved in the controversy. The judgment of the court below is

Affirmed.

KELLEY BATTS, BY A. W. CRAWLEY, HIS NEXT FRIEND, v. E. I. DUPONT DE NEMOURS COMPANY AND A. T. FULGHUM.

(Filed 23 March, 1927.)

APPEAL by plaintiff from *Bond, J.,* at October Term, 1926, of WAKE.

Morris & Parker, Bart M. Gatling and W. F. Evans for plaintiff.
Biggs & Broughton for I. E. DuPont de Nemours Company.

PER CURIAM. The DuPont de Nemours Company filed a petition for the removal of this cause from the Superior Court of Wake County to the United States District Court for the Eastern District of North Carolina for alleged diversity of citizenship, separable controversy, and fraudulent joinder of parties. The petition was allowed, and the plaintiff excepted and appealed. We find no error. Judicial Code, ch. 3; Rose's Fed. Jurisdiction, ch. 13; *R. R. v. Allison,* 190 U. S., 326, 47 Law Ed., 1079; *Van Dyke v. Ins. Co.,* 192 N. C., 206; *Huntley v. Express Co.,* 191 N. C., 696; *Johnson v. Lumber Co.,* 189 N. C., 81.

The judgment is
Affirmed.

STATE v. B. B. TOMLINSON, JR.

(Filed 23 March, 1927.)

APPEAL by defendant from *Bond, J.,* at October Term, 1926, of FRANKLIN.

Criminal prosecution tried upon an indictment charging the defendant with the felonious seduction of an innocent and virtuous woman, under promise of marriage, contrary to the provisions of the statute, C. S., 4339, in such cases provided, and against the peace and dignity of the State.

From an adverse verdict and sentence of twelve months in the State's prison, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
Ben T. Holden and Edward F. Griffin for defendant.

PER CURIAM. The defendant relies chiefly upon his exception to the refusal of the court to grant his motion for judgment as of nonsuit, duly made under C. S., 4643, first at the close of the State's evidence and renewed at the close of all the evidence.

From a careful perusal of the record, viewing the evidence in its most favorable light for the prosecution, the accepted position on a motion of this kind, we are convinced that the case was properly submitted to the jury. No benefit would be derived from detailing the testimony of the several witnesses, as the principal question before us is whether it is sufficient to carry the case to the jury, and we think it is.

The exceptions relating to the admission and exclusion of evidence and those addressed to portions of the charge must all be resolved in favor of the validity of the trial.

The verdict and judgment will be upheld.

No error.

IRA BOYKIN, ADMINISTRATOR OF G. R. BOYKIN, v. E. I. DUPONT DE NEMOURS COMPANY AND W. H. NORDAN.

(Filed 23 March, 1927.)

APPEAL by plaintiff from *Bond, J.*, at October Term, 1926, of WAKE.

Morris & Parker, Bart M. Gatling and W. F. Evans for plaintiff.
Biggs & Broughton for I. E. DuPont de Nemours Company.

PER CURIAM. This case is controlled by the decision in *Batts v. DuPont de Nemours Company, ante,* 838. The judgment removing the cause to the United States District Court for the Eastern District of North Carolina is

Affirmed.

N. A. WILLIAMS v. SIMON GEDDIE.

(Filed 30 March, 1927.)

APPEAL by plaintiff from *Midyette, J.*, at September Term, 1926, of CUMBERLAND.

Independent action to set aside the verdict and judgment rendered in a former case between the same parties, the positions of plaintiff and defendant being reversed in the former suit.

Plaintiff bottoms his present action on the alleged misconduct of the defendant in trying improperly to influence the jury in the former case. By consent, a jury trial was waived, and both sides agreed that the cause might be heard and determined by the judge without a jury.

The judge finds in his ninth finding of facts: "That no fraud was perpetrated on said jury, and no influence brought to bear that in any way influenced or was calculated to influence said verdict."

From a judgment in favor of defendant the plaintiff appeals, assigning errors.

J. C. Little and C. M. Walker for plaintiff.
S. C. McPhail and Bullard & Stringfield for defendant.

PER CURIAM. A careful perusal of the record, together with the authorities applicable, convinces us that no legal error was committed on the hearing which would entitle the plaintiff to a new trial.

What was said in *Bowman v. Howard,* 182 N. C., 662, both in the opinion of the Court and also in the dissenting opinion filed therein, is in support of his Honor's ruling.

No error.

FARMERS BANK AND TRUST COMPANY v. CAPTAIN WILLIAM M. MURPHY, W. H. MALPASS AND SAMUEL SNELL, INTERVENER, DEFENDANTS.

(Filed 30 March, 1927.)

APPEAL by Samuel Snell, intervener, from *Grady, J.,* and a jury, at November Term, 1926, of PENDER. No error.

Gavin & Boney, C. E. McCullen and Geo. R. Ward for plaintiff.
J. T. Bland for intervener, Samuel Snell.

PER CURIAM. This case was here before. See *Bank v. Murphy,* 189 N. C., p. 479.

From a careful examination of the record we can discover no prejudicial or reversible error. The controversy appears to be one of fact, which has been determined by the jury. There is

No error.

O. R. SMITH v. W. G. FIELDS ET AL.

(Filed 6 April, 1927.)

APPEAL by defendants from *Lyon, Emergency Judge,* at October Term, 1926, of ORANGE.

Civil action to recover balance alleged to be due the plaintiff under a contract for sawing and hauling lumber for the defendants.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning errors.

A. H. Graham and Gattis & Gattis for plaintiff.
A. C. Ray for defendants.

PER CURIAM. The defendants *in limine* lodged a motion for a new trial on the ground of newly discovered evidence. It is alleged that the information, which defendants consider vital and important to their case, came to their attention after the adjournment of the term of court at which the case was tried, and after the appeal was docketed here. *Allen v. Gooding,* 174 N. C., 271. The showing made in this respect seems to meet the requirements laid down in *Johnson v. R. R.,* 163 N. C., p. 453, for the granting of new trials on the ground of newly discovered evidence. Upon this ground the cause will be remanded for another hearing.

New trial.

W. H. LAWRENCE ET AL. v. FIDELITY BANK, GUARDIAN.

(Filed 6 April, 1927.)

APPEAL by plaintiffs from order of *Midyette, J.,* at January Term, 1927, of DURHAM.

Civil action tried upon the following issues:

"1. Are all of the items charged to George Washington Thomas, except checks under date of 6 July, 22 July, and 12 August, barred by the statute of limitations? Answer: No.

"2. In what amount, if any, is the defendant indebted to the plaintiffs? Answer: $1,680.86."

Upon motion of defendants, the court set aside the verdict, as a matter of law, but without assigning any reason therefor (*Smith v. Winston-Salem,* 189 N. C., 178; *Powers v. Wilmington,* 177 N. C., 361), and from this ruling the plaintiffs appeal, assigning errors.

McLendon & Hedrick for plaintiffs.
R. P. Reade for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Brogden, J.,* not sitting, the ruling of the lower court is affirmed and stands, according to the uniform practice of appellate courts, as the decision in this case, without becoming a precedent for the future. *Raynor v. Life Ins. Co., ante,* 385.

Affirmed.

J. F. MORRIS v. WINSTON-SALEM APARTMENT COMPANY.

(Filed 13 April, 1927.)

APPEAL by defendant from *Oglesby, J.,* at November Term, 1926, of FORSYTH.

Swink, Clement & Hutchins for plaintiff.
Holton & Holton, J. E. Alexander and Lacy M. Butler for defendant.

PER CURIAM. For the purpose of raising money to put up an apartment building the defendant in 1922 put on the market 7 per cent preferred stock amounting to $100,000, and employed Pope Seals to sell the stock. Seals employed Louis Mayhew as a sub-agent. These two sold the plaintiff ten shares of the par value of $100 a share, and caused to be issued a certificate therefor, the transaction including a bonus of fifty shares of common stock. The plaintiff turned over to the agents in payment thirty shares of the common stock of the Robert E. Lee Hotel, each of the par value of $100, and two second mortgage bonds of the hotel, each of the value of $50. By an agreement with its secretary and treasurer Mayhew gave the defendant his note for $1,000, but plaintiff had no knowledge of the transaction.

The object of the action is to compel the payment of dividends on the plaintiff's stock. The defendant resists payment for the alleged reason that the plaintiff's stock was not paid for in money or money's worth as required by C. S., 1157.

After an examination of the record and the briefs we find no error which in our opinion entitles the defendant to a new trial.

No error.

J. W. BURROUGHS AND E. K. POWE, JR., v. H. V. UMSTEAD AND WIFE, HATTIE FREELAND UMSTEAD.

(Filed 13 April, 1927.)

Reference—Trial by Jury—Waiver.

By not excepting to a compulsory order of reference, and by failing to appear before the referee upon due notification of the hearings, a party waives his right to assert that the reference was not authorized by the statute, and upon the failure to tender issues for the jury upon the findings, the right to a trial by jury is also waived.

APPEAL by defendants from *Clifford, Emergency Judge,* at September Term, 1926, of DURHAM. Affirmed.

Victor S. Bryant for plaintiffs.
R. O. Everett for defendants.

PER CURIAM. This cause, with others which defendants' attorney appeared in, was referred by the judge presiding at November Term, 1925, to Beverly S. Royster, Jr. The order states that "said causes involve accounts . . . and it appearing to the court that said causes ought to be referred." The referee was ordered to fix the time and place for the hearing, notify counsel, giving at least five days notice before the hearing, and to find the facts and report to the court said findings and conclusions of law. Defendants had no actual notice of the order of reference in this cause, and the only notice was constructive by reason of the case being on the docket in the Superior Court. Defendants at the time made no exception.

The referee notified defendants' attorney on 1 December, 1925, that a hearing would be had on 9 December, 1925. No complaint was made to the reference when defendants were notified by the referee or exceptions taken, but defendants' attorney stated in the letter to the referee, dated 3 December, 1925, "I will try them at some later date if you will find it agreeable to your convenience to have the matter heard." The referee, in compliance with the request, postponed the hearing.

On 18 February, 1926, the referee notified the defendants' attorney that he expected to be in Durham on Thursday and Friday, 25 and 26 February, 1926, for the purpose of hearing the cases referred to him by the judge, and to arrange to be present to look after the ones in which he was interested.

On 19 February, 1926, defendants' attorney advised the referee that he would look after the matter referred to him by the judge on the dates mentioned if it was convenient.

The referee had the hearing, defendants' attorney not appearing, and made a report, finding for plaintiffs. The report of the referee was filed about 7 May, 1926. On 1 June, 1926, defendants for the first time filed certain exceptions and demanded a jury trial.

At the September Term, 1926, the defendants excepted to the report of the referee and moved (1) that the order of 6 November, 1925, be stricken out, as there was no authority under the law to order a compulsory reference; (2) it did not appear when the referee's report was filed and the witness' testimony was not subscribed to as required by the statute, (3) and original order of reference was made without notice and demand for a jury trial. These exceptions were all overruled by the court below and judgment rendered for plaintiffs. Defendants assigned errors and appealed to the Supreme Court.

Defendants contend "The sole question presented by this appeal concerns the right of a judge to make a compulsory reference."

From the record, we think the assignments of error cannot be sustained, and the sole question presented, if in the beginning tenable, lost by waiver. The defendants had notice of the reference twice, asked for a continuance to a later date, and when notified of that date did not appear, and the referee heard the evidence and made his report of the finding of facts and conclusion of law, and thereon rendered judgment for plaintiffs. The silence gave consent, and defendants, from the facts and circumstances of this case, have waived and are estopped to assert the rights now contended for. *Driller Co. v. Worth,* 117 N. C., 515; *Simpson v. Scronce,* 152 N. C., 594; *Baker v. Edwards,* 176 N. C., 229; *Armstrong v. Polakavetz,* 191 N. C., 731; *Jenkins v. Parker,* 192 N. C., 188.

In the present case the defendants tendered no issues on the exceptions filed by them, and if the exceptions had been filed at the proper time, yet this failure to tender issues on the controverted facts was a waiver of the right to jury trial. *Simpson v. Scronce, supra.*

The judgment below is

Affirmed.

BROGDEN, J., did not sit, and took no part in the decision of this case.

M. L. HATLEY v. M. J. WRENN.

(Filed 20 April, 1927.)

APPEAL by plaintiff from *Oglesby, J.,* at February Term, 1927, of GUILFORD. Affirmed.

Adams & Adams, Walser & Walser, and Z. I. Walser for plaintiff.
King, Sapp & King for defendant.

PER CURIAM. This is an action to recover damages for personal injury, alleged to have been caused by the defendant's negligence. The plaintiff was employed by G. G. Russell, who, it seems, was an independent contractor, to paint the defendant's house, and while engaged in his work the ladder on which he was standing slipped, "whipped around the post," and the plaintiff fell to the ground and was injured. At the close of his evidence the action was dismissed as in case of nonsuit, and he excepted and appealed. It is clear, we think, that the judgment should

be affirmed. *Covington v. Furniture Co.,* 138 N. C., 374; *Simpson v. R. R.,* 154 N. C., 51; *Mercer v. R. R., ibid.,* 399; *Mace v. Mineral Co.,* 169 N. C., 143; *Silvey v. R. R.,* 172 N. C., 110; *Winborne v. Cooperage Co.,* 178 N. C., 88.

Affirmed.

R. M. GILLIE v. J. H. MOORE, ADMINISTRATOR OF J. M. GALLAWAY, DECEASED.

(Filed 20 April, 1927.)

APPEAL by defendant from *Oglesby, J.,* at June Term, 1926, of ROCKINGHAM.

Civil action to recover the balance alleged to be due on an account between the parties, represented by orders signed by J. M. Gallaway, deceased.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Sharp & Crutchfield for plaintiff.
Junius C. Brown for defendant.

PER CURIAM. The controversy on trial narrowed itself principally to issues of fact, which the jury alone could determine. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error. A careful perusal of the entire record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable.

No error.

STATE v. Q. A. McWHIRTER.

(Filed 20 April, 1927.)

CRIMINAL ACTION, tried before *Oglesby, J.,* at December Term, 1926, of FORSYTH.

The defendant was tried upon a bill of indictment charging him with assault with intent to commit rape. The jury found the defendant guilty of assault on a female by a male person over the age of eighteen years.

From judgment of the court sentencing him to work upon the public roads for a term of two years, the defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. M. Porter and J. D. McCall for defendant.

PER CURIAM. The defendant asserts that the jury rendered a verdict that he was not guilty of assault with intent to commit rape, as charged in the bill of indictment, "but guilty of simple assault on a female," and therefore no punishment could be imposed in excess of imprisonment for thirty days, or a fine of fifty dollars. However, the record discloses that the verdict rendered was "guilty of assault on a female by a male person over the age of eighteen years." On appeal the record imports verity, and we are not permitted to consider any matter not appearing therein. A close scrutiny of the record fails to disclose any error of law, and therefore the judgment must stand.

No error.

STATE v. HADLEY HELMS.

(Filed 27 April, 1927.)

APPEAL by defendant from *Finley, J.,* at October Term, 1926, of UNION. No error.

Indictment for seduction. From judgment upon verdict of guilty, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

John C. Sikes and Vann & Milliken for defendant.

PER CURIAM. The only assignment of error discussed in the brief filed for defendant upon his appeal to this Court is based upon his exception to the refusal of his motion that the action be dismissed, for that there was no evidence in support of the testimony of prosecutrix as to at least two of the elements of the crime for which he was convicted. C. S., 4339. Assignments of error based upon other exceptions appearing in the record are abandoned. Rule 28.

We find no error in the refusal of the court to dismiss the action upon the contention made by defendant. There was evidence in support of the testimony of the prosecutrix as to each of the elements of the crime. This evidence, together with the testimony of the prosecutrix, was properly submitted to the jury. It is sufficient to sustain the verdict, and the judgment is affirmed.

No error.

STATE v. ELIJAH HARRIS AND JAMES WALL.

(Filed 27 April, 1927.)

APPEAL by defendants from *Finley, J.*, and a jury, at September Term, 1926, of ANSON. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
No counsel for defendants.

PER CURIAM. The defendants made exceptions and assignments of error, but filed no brief. From an examination of the entire record, we can discover no error. Before the argument, defendants filed a written motion for a new trial on the ground of newly discovered evidence. In criminal cases this Court never entertains a motion of this kind. *S. v. Griffin*, 190 N. C., p. 133, and cases cited.

There is
No error.

STATE v. J. W. HUGHES.

(Filed 27 April, 1927.)

APPEAL by State from *Bond, J.*, at January Term, 1927, of NEW HANOVER. Reversed.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Burgwyn for the State.
Wright & Stevens for defendant.

PER CURIAM. We have carefully considered the facts as set forth in the special verdict in this case. We think the ordinance valid under the authority of *Express Co. v. Charlotte*, 186 N. C., p. 668. *S. v. Denson*, 189 N. C., p. 173. 3 C. S., 2612 (a) (Public Laws 1921, ch. 2, sec. 29), is the law now in force under which the *Express Co. case, supra,* was decided and the ordinance in the present case adopted. The case of *S. v. Jones*, 191 N. C., p. 371, is not in conflict. See *Thompson v. Lumberton*, 182 N. C., p. 260.

The judgment of the court below is
Reversed.

STATE v. ARTHUR CARPENTER.

(Filed 4 May, 1927.)

APPEAL by defendant from *Schenck, J.*, at October Term, 1926, of GASTON. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
E. R. Warren and George W. Wilson for defendant.

PER CURIAM. The defendant's exceptions must be overruled. The fact that McGinnis may have been a notorious "blind tiger" could not have availed the defendant. *S. v. Lane,* 166 N. C., 333. There was evidence that the defendant's admission was voluntary, and for this reason the third and fifth exceptions are untenable. The instruction as to the defendant's possession of the liquor is sustained by *S. v. McAllister,* 187 N. C., 400. The other exceptions are without merit and require no discussion.

No error.

E. R. LUTZ ET AL. v. COASTAL CONSTRUCTION COMPANY.

(Filed 18 May, 1927.)

APPEAL by plaintiffs from *Barnhill, J.*, at August Term, 1926, of COLUMBUS. No error.

Action to recover for services rendered and expenses incurred by plaintiffs in behalf of defendant with respect to defendant's application for a bond which defendant was required to file with the State Highway Commission to secure the performance by defendant of its contract with said commission.

The issues submitted to the jury were answered as follows:

1. Did the defendant apply to the National Surety Company, through its agent, E. R. Lutz, for the issuance of a performance bond covering the construction of Highway Project No. 330, Columbus County, as alleged? Answer: Yes (by consent).

2. If so, did the National Surety Company accept said application and agree to deliver such bond in accordance with the agreement between the defendant and the plaintiff? Answer: No.

3. If so, did the defendant fail and refuse to accept and pay for same? Answer:

Powell & Lewis for plaintiffs.
Lyon & Burns for defendant.

PER CURIAM. The jury having answered the second issue "No," plaintiffs' assignments of error, based upon exceptions to the refusal of the court to submit issues as tendered by plaintiffs, and to the exclusion of evidence pertinent only to other issues, need not be considered on their appeal to this Court. There are no assignments of error with respect to the second issue. In no event could plaintiffs recover upon the cause of action set out in the complaint without an affirmative answer to the second issue. The court properly instructed the jury that if they answered the second issue "No," they need not answer the third issue.

There is no error on the record, and the judgment must be affirmed.

No error.

F. H. CHAMBERLAIN v. SOUTHERN DYEING COMPANY.

(Filed 18 May, 1927.)

1. Instructions—Appeal and Error—Objections and Exceptions—Contentions.

The practice of the trial judge in stating the contentions of the parties rests by custom and not by statute, and for alleged error therein the appealing party must have excepted at the time affording the judge an opportunity for correction.

2. Appeal and Error—Briefs—Assignments of Error.

In order to comply with Rule 28, regulating appeals to the Supreme Court, the briefs should "properly number the several grounds of exception and assignments of error with reference to the printed pages of transcript and cite the authorities relied on classified under such assignment.

CIVIL ACTION, tried before *Walter E. Moore, J.*, and a jury, at January Term, 1927, of LINCOLN.

The issue submitted to the jury was: "Is the defendant indebted to the plaintiff, and if so, in what amount?"

The jury answered the issue $250, and from judgment upon the verdict the defendant appealed.

A. L. Quickel for plaintiff.
Carroll & Carroll for defendant.

PER CURIAM. The plaintiff instituted an action against the defendant to recover the sum of $250 for services or commission in effecting a sale of certain machinery belonging to the defendant. The defendant denied that plaintiff had been instrumental in making said sale, contending that the parties were merely negotiating to ascertain if a satisfactory agreement could be reached as to the purchase price of the property. The evidence of plaintiff tended to establish a definite contract of sale and the amount of compensation or commission due for his services in making the sale. The evidence of the defendant was to the contrary. Thus, a clear-cut issue of fact arose, and it was the sole and exclusive function of the jury to determine the facts. However, the defendant attacks the charge of the trial judge upon two grounds. First, the failure to properly state the contention of defendant. Second, erroneous instruction to the jury. The statute, C. S., 564, does not require the judge to state the contentions of parties, but it has become the fixed practice to do so. However, the record discloses that the trial judge did state the chief contentions of defendant. If the contentions were improperly or incorrectly stated, it was the duty of defendant to call attention thereto at the time. *S. v. Sinodis,* 189 N. C., 571, and cases cited.

The record further discloses that at the conclusion of the charge the judge inquired of counsel if there was anything further either party desired included in the charge, and that, in response to this inquiry, there was no request by the defendant for further instructions, or for a more elaborate arraying of its contentions.

We have examined the instructions given the jury and can discover no material or reversible error. Hence the judgment is affirmed.

The appellant's brief does not contain, "properly numbered, the several grounds of exception and assignments of error with reference to the printed pages of transcript and the authorities relied on classified under each assignment," as required by Rule 28. The grouping of exceptions and assignments of error do not refer to the pages of the record and do not contain the particular language to which the exception is taken, or reference to the page of the record where the objectionable matter can be found. *Rawls v. Lupton, ante,* 428.

Affirmed.

R. W. EDWARDS v. E. D. EDWARDS.

(Filed 18 May, 1927.)

APPEAL by plaintiff from *Grady, J.,* at November Term, 1926, of COLUMBUS.

Civil action for damages, brought by plaintiff against his brother for alienating his wife's affections, debauching her, and causing her to leave plaintiff's home.

From a verdict and judgment in favor of defendant, the plaintiff appeals, assigning errors.

Donald MacRackan for plaintiff.
Lyon & Burns for defendant.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in accord with the principles of law applicable, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

There is a sharp conflict in the evidence on the issue of liability, but this was purely a question of fact; the jury has determined the matter against the plaintiff; there is no reversible error appearing on the record; the exceptions relating to the admission and exclusion of evidence, and those to the charge, must all be resolved in favor of the validity of the trial; the case presents no new question of law, or one not heretofore settled by our decisions; it only calls for the application of old principles to new facts. The verdict and judgment must be upheld.

No error.

P. D. STORY v. J. W. TRUITT, TRADING AS J. W. TRUITT & COMPANY, AND J. P. TRANT.

(Filed 18 May, 1927.)

Reference—Evidence—Appeal and Error—Trial by Jury—Waiver.

Where there is conflicting evidence, the report of the referee approved and affirmed by the trial judge upon sufficient evidence, is not reviewable on appeal, when a jury trial has been waived by the conduct of the parties.

APPEAL by plaintiff from *Calvert, J.*, at October Term, 1926, of HERTFORD.

R. C. Bridger for plaintiff.
John E. Vann and W. D. Boone for defendant J. W. Truitt.

PER CURIAM. At April Term, 1923, a compulsory reference in the above entitled action was ordered by the court below, and L. J. Lawrence, Esquire, was appointed referee. The record, which imports verity, shows that no exception was taken by the plaintiff to the reference.

The right to a jury trial was waived. *Driller Co. v. Worth,* 117 N. C., p. 515; *Baker v. Edwards,* 176 N. C., 229; *Jenkins v. Parker,* 192 N. C., 188; *Burroughs v. Umstead, ante,* 842.

"It is the accepted position with us that the findings of fact by a referee, concurred in by the judge, are conclusive when there is competent evidence to sustain them." *Comrs. v. Abee Bros.,* 175 N. C., 701; *Hardy v. Thornton,* 192 N. C., p. 296; *Cotton Mills v. Cotton Yarn Co., ibid.,* p. 713.

Upon a careful perusal of the record, there was competent evidence to sustain the findings of fact by the referee. The court below, in its judgment, set forth that exceptions of plaintiff were overruled, and "hereby confirms and adopts the findings of fact and conclusions of law set forth in said report of the referee as fully and in the same manner as if herein recited."

For the reasons given, the judgment of the court below is

Affirmed.

MILLIKEN LAND COMPANY v. J. G. HORD.

(Filed 25 May, 1927.)

APPEAL by defendant from *Schenck, J.,* at August-September Term, 1926, of GUILFORD. No error.

Action to recover upon check for $1,000, drawn by defendant and payable to order of plaintiff. The bank on which the check was drawn, in compliance with instructions of defendant, subsequent to its delivery, refused to pay same upon its presentation by plaintiff. Thereupon plaintiff commenced this action to recover of defendant, drawer of the check, the amount thereof.

Issues submitted to the jury, presenting matters upon which defendant relied in defense of plaintiff's recovery, were answered adversely to defendant's contentions.

From judgment upon the verdict, defendant appealed to the Supreme Court.

King, Sapp & King for plaintiff.
S. J. Durham for defendant.

PER CURIAM. In his brief filed in this Court, counsel for defendant, who appealed from the judgment of the Superior Court, abandoned his exceptions Nos. 2, 4, and 5.

The remaining exceptions upon which assignments of error are based have been duly considered. They present no questions of law which require discussion. They cannot be sustained. Issues tendered by defendant present the question as to whether or not there was a novation of the contract between plaintiff and defendant with respect to the sale of defendant's land by plaintiff. The jury has found that there was such novation, and that neither plaintiff nor defendant is entitled to recover damages for breach of the contract as found by the jury. Upon these findings, plaintiff is entitled to recover upon the check, drawn by defendant and delivered to plaintiff after the sale, in settlement of the amount due in accordance with the terms of the contract.

The judgment is affirmed. We find

No error.

IN RE WILL OF MARY WILSON.

(Filed 25 May, 1927.)

CIVIL ACTION, tried before *Bond, J.*, and a jury, at January Term, 1927, of BRUNSWICK.

By consent of parties, three separate papers, dated respectively 23 January, 1922, 27 October, 1923, and 15 January, 1925, which had been propounded for probate as the last will and testament of Mary E. Wilson, were submitted to the jury on an issue of *devisavit vel non.* The several issues were answered by the jury, who said that the paper-writing dated 15 January, 1925, was the last will and testament of the deceased, and that the other two papers were not her last will and testament.

Judgment was rendered upon the verdict, and appeal was taken upon exceptions noted.

The appellants are the propounders of the second alleged will, and the caveators of the third.

Robert W. Davis for appellants.
C. Ed. Taylor for appellees.

PER CURIAM. The assignments of error set out in the brief of the appellants have been carefully considered. They present no question which requires special discussion and no exception which shows reversible error. The entire controversy was fairly presented to the jury, and the verdict, which is conclusive as to the facts, is amply supported by the evidence.

We find

No error.

J. W. PRUETT ET AL. v. TUCKASEEGEE AND SOUTHEASTERN RAILWAY COMPANY.

(Filed 10 June, 1927.)

APPEAL by defendant from *Harwood, J.,* at October Term, 1926, of JACKSON.

Sutton & Stillwell for plaintiff.
Alley & Alley for defendant.

PER CURIAM. The plaintiffs brought suit to recover damages for injury to their property caused by fire alleged to have been negligently set out by the defendant in the operation of its train. The one exception appearing in the record presents the question whether the presiding judge complied with C. S., 564. The appellant has failed to convince us that he did not. We find

No error.

J. I. MASON, DOING BUSINESS AS MASON & COMPANY, v. TOWN OF ANDREWS.

(Filed 10 June, 1927.)

Appeal and Error—Burden of Proof—Evidence—Questions and Answers.

The burden is on appellant to show error on appeal, and where he has excepted to the exclusion of evidence, he must show its nature, and that he has thereby been prejudiced.

APPEAL by defendant from *Harding, J.,* and a jury, at November Term, 1926, of CHEROKEE. No error.

D. H. Tillett and D. Witherspoon for plaintiff.
Moody & Moody for defendant.

PER CURIAM. This case was here before on appeal by defendant from a judgment in favor of plaintiff and a new trial awarded defendant. *Mason v. Andrews,* 192 N. C., p. 135.

On the second trial in the court below, the plaintiff again obtained a judgment against the defendant, and the defendant appealed again to the Supreme Court.

Defendant made numerous exceptions and assignments of error to the admission and exclusion of evidence on the trial in the court below, and also to the charge of the court.

A great many exceptions and assignments of error made by defendant do not indicate in the record what the answer of the witnesses would have been.

In *Rawls v. Lupton, ante,* 430, citing a wealth of authorities, it is said: "There is nothing in the record to indicate or disclose what the answers would have been to the question propounded the witness. We cannot assume that they would have been favorable to plaintiff. The burden is on the appellant to show error; therefore, the record must set forth and disclose the materiality and competency of the evidence. The record is silent. A long line of unbroken authorities, civil and criminal, support the position here taken."

From a careful perusal of the record, we do not think the errors complained of by defendant on the whole material or prejudicial, or such as would be reversible error or entitle defendant to a new trial.

In *Simpson v. Tobacco Growers,* 190 N. C., at p. 605, it is said: "Error will not be presumed on appeal; it must be affirmatively established. Appellant is required to show error, and he must make it appear plainly, as the presumption is against him. *In re Ross,* 182 N. C., 477."

The court below tried the case substantially as indicated in the former opinion of this Court. It was mainly an issue of fact for the jury to determine.

In law, we find

No error.

O. HENRY MOORE v. G. L. TIDWELL ET AL.

(Filed 10 June, 1927.)

Evidence—New Trials—Newly Discovered Evidence—Appeal and Error.

Under the facts of this case, a motion for a new trial for newly discovered evidence made in the Supreme Court is allowed, the refusal of the motion by the trial judge not being reviewable.

APPEAL by defendants from *Schenck, J.,* at December Term, 1926, of MECKLENBURG.

Civil action in tort to recover damages for an alleged personal injury, tried upon issues of negligence, liability and damages, resulting in a verdict and judgment for the plaintiff, from which the defendants L. B. Cress and J. F. Lowder appeal, assigning errors.

Carswell & Ervin and John M. Robinson for plaintiff.

Hartsell & Hartsell and Preston & Ross for appealing defendants.

PER CURIAM. The defendants *in limine* renew their motion, originally made in the Superior Court, for a new trial on the ground of newly discovered evidence. It is alleged that additional information, which defendants consider vital and important to their cause, has come to their attention since the adjournment of the term of court at which the case was tried, and after the appeal was docketed here. *Allen v. Gooding,* 174 N. C., 271. The showing made by defendants in this respect seems to meet the requirements laid down in *Johnson v. R. R.,* 163 N. C., p. 453, for the granting of new trials on the ground of newly discovered evidence. Hence, for this reason, the cause will be remanded for another hearing.

Our ruling, it will be observed, is bottomed upon the motion and showing made here, and not upon the refusal of the trial court to grant the motion on the evidence offered before him, for no appeal lies from such refusal, unless based upon a mistaken view of the law. *Flowers v. Alford,* 111 N. C., 248; *Carson v. Dellinger,* 90 N. C., 226.

New trial.

ED. JENKINS v. BLACKWOOD LUMBER COMPANY.

(Filed 10 June, 1927.)

Negligence—Evidence—Master and Servant—Safe Place to Work—Nonsuit.

Evidence in this case, *Held* sufficient to take the case to the jury upon the question as to whether the defendant had failed in its duty to furnish, in the exercise of ordinary care, its employee a safe place to work, and defendant's motion to nonsuit was properly denied in the absence of evidence tending to show contributory negligence, etc.

APPEAL by defendant from *Stack, J.,* at February Term, 1927, of JACKSON. No error.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. From judgment on the verdict, defendant appealed to the Supreme Court.

Sutton & Stillwell and Moody & Edwards for plaintiff.
Alley & Alley for defendant.

PER CURIAM. Defendant's only assignment of error on its appeal to this Court is based upon its exception to the refusal of the court to allow its motion for judgment as of nonsuit at the close of the evidence offered by plaintiff. Defendant offered no evidence, but relied upon its contention that there was no evidence from which the jury could find that plaintiff was injured by its negligence.

Plaintiff, an employee of defendant, was required to go upon a bridge, 108 feet in length and constructed on a grade of about 14 per cent, over which there was a "skidway" upon which certain logs had become "jammed," for the purpose of dislodging the logs. After plaintiff had dislodged these logs, some 15 or 16 in number, they moved down the skidway so rapidly that plaintiff was thrown down among the logs and injured. No provision was made in the construction of the bridge for plaintiff to escape or get out of the way of the logs when they broke and started down the skidway. There was evidence from which the jury could find that defendant had failed to exercise due care to provide a reasonably safe place for plaintiff to work, and that this breach of duty was the proximate cause of plaintiff's injuries. The jury found that plaintiff did not by his own negligence contribute to his injury, and that he did not assume the risk, as alleged in the answer.

The judgment that plaintiff recover of defendant his damages as assessed by the jury is affirmed. There is

No error.

SOLOMON MALOOF v. FLOYD MOTOR COMPANY.

(Filed 10 June, 1927.)

Evidence—Bailment—Fires—Negligence—Burden of Proof.

Where an automobile is kept in a garage for repair and has been destroyed by fire, the burden is on the defendant to show that it was not negligent to rebut the doctrine of *res ipsa loquitur*, under the decision in *Beck v. Wilkins*, 179 N. C., 231.

CIVIL ACTION, before *Harding, J.*, at October-November Term, 1926, of SWAIN.

The plaintiff instituted an action against the defendant for damages for the loss of his automobile, which was burned while in the possession of the defendant. There was no evidence as to the origin of the fire which injured plaintiff's automobile.

The narrative of the occurrence was thus expressed by one of the witnesses for the defendant: "The first intimation I heard of the fire, I was downstairs in the office and heard an explosion of some kind, a noise, and I immediately ran upstairs and run up there and found a flame in the room. I don't know what was the cause of the fire. I have never been able to ascertain the cause of the fire. I have been trying to find out."

Issues of negligence and damage were submitted to the jury, and $300 was awarded to the plaintiff.

From judgment upon the verdict, the defendant appealed.

J. N. Moody and Thurman Leatherwood for plaintiff.
S. W. Black and T. D. Bryson for defendant.

PER CURIAM. The essential facts of the present case are the same as appear in the case of *Beck v. Wilkins,* 179 N. C., 231, and the principles of law announced in that case are decisive of this controversy.

No error.

CASES FILED WITHOUT WRITTEN OPINIONS

ANGELO v. WINSTON-SALEM.

COOPER v. WOOD & CO.

WORLEY v. TAYLOR.

YELVERTON v. YELVERTON.

DISPOSITION OF APPEALS FROM SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

M. A. Inge *v.* Seaboard Air Line Railway Co. Petition for writ of *certiorari* denied.

E. J. Angelo et al. *v.* City of Winston-Salem et al. Affirmed on writ of error.

George L. Wimberley, Jr., Admr., *v.* Atlantic Coast Line R. R. Reversed on writ of *certiorari.*

PRESENTATION OF THE PORTRAIT

OF THE LATE ASSOCIATE JUSTICE OF THE SUPREME COURT

GEORGE HUBBARD BROWN

APRIL 12TH, 1927

ADDRESS BY

HONORABLE ROBERT WATSON WINSTON

May it please the Court: It is becoming quite customary, I observe, to refer to "the old court" as though the term had a definite meaning. And in one sense it has. To every lawyer the old court signifies the court which examined him and granted his license. Thus to me, the old court is Smith, Ashe, and Ruffin. To most lawyers, however, at this time the old court is Clark, Walker, Connor, Hoke, and Brown. Some day, your Honors—may the day be far distant—you yourselves will have become "the old court."

Now the court composed of Chief Justice Clark and the Associates I have just called over, was as typical a body as could have been chosen—taken as a whole, they were the Old North State in epitome. As geographically the State of North Carolina lies in the North Temperate Zone, so politically and economically her courts and other agencies of government lie between the 32d and 36th degrees of north latitude. In nothing is the good State radical, except in conservatism.

In the generalization which I am now making, I do not refer to the individual members of the old court, but to that body as a unit. For individually only two of its members, I should say, were typical of the State—probably only one. Certainly the Chief Justice, with ideas of judicial progress which startled even the sagebush courts of the northwest, was not typical of the good Old North State; nor was Walker, with the exclusive aroma of the Cape Fear; nor Brown, with a total indifference as to whether his decisions pleased or displeased the *News and Observer.* As concerns the other two Judges, Connor and Hoke, it must be said of the former, there was a judicial tenderness and equipoise, which places him in a class by himself, his sweet-spirited soul could not typify the rough hail-fellow-well-met, unconventional commonwealth of North Carolina. Hoke, then, with his loud, honest laugh, his hearty ways, his assumed air of Democratic lineage and environment, undoubtedly stood for the unconventional old Tar Heel State. This attempt at classification is subject, however, to your Honors' better judgment and correction.

Taken as a whole, the old court had all the earmarks of the great State they served—courage, honesty, fairness, poise, and intellect. In a poem called "Hatteras," the author, Joseph Holden, draws a strong picture. Halfway between the poles lies the State of North Carolina. The north wind, rushing down from one pole, challenges the south wind, rushing up from the other, to mortal combat. The challenge is accepted, and they meet; off Hatteras, the Golgotha of the sea, they fight. Mountain-high roll the waves, "beckoning the white-winged brides of the ocean to watery graves." As with the physical forces of North Carolina, described by the poet, so with her social and political. Extremes challenge each other to combat; they meet, but neutralize one the other. The north wind of radicalism often challenges the south wind of conservatism to combat, and they meet on North Carolina soil. It seems certain that something terrible is going to happen at last; but, when the flurry is over, there stands the Old State serene and smiling and firmly fixed to her ancient moorings.

By one or two votes only the impeachment of the judges was defeated; by one vote of this Court the scheme to run out Kilgo and the Dukes, thereby depriving the State of eighty millions for education and charity, was likewise defeated. It must be admitted that the resultant of all the work done in North Carolina is good, the tendency is upward. Analyzing the composite picture of the old court, can it not be said that Clark was the exponent of radicalism? Hoke the exponent of democracy, and Walker the adherent of precedent? Undoubtedly of the five Connor was the chancery judge, while Brown was the law judge. Out of this mixture of radicalism and conservatism, of democracy and aristocracy, of equity and jurisprudence, came the old court. And of it it must be said that the whole was greater than the sum of its parts. For behind this Court stood nearly three million freemen, and behind it also stood an honest record of justice tempered with mercy. Like the compensating clock, with a pendulum of steel and mercury, the steel pressing downward, the mercury pressing upward, the resultant is always the correct time.

The part George Hubbard Brown played in this judicial drama was unique, more so, perhaps, than that of any other actor on the boards. From the day North Carolina judges were elected and not appointed, Judge Brown filled a place no other judge has ever filled—he was the acknowledged exponent of the vested interests of the State. Not only did he not cater to the people, he advocated principles they opposed. On the bench he stood for property and property rights as much as for the rights of persons. Not only did he do this, but he gloried in the fact; and so long had he stood for equal and exact justice to corporate interests, his course—paradoxical as it sounds—had become a source of strength and not of weakness. In party conventions and at the polls the State of North Carolina, with its checks and balances adjusting the rights of persons and the rights of things, looked to George H. Brown to represent the latter. For sixteen years Justice Brown was the judicial shock-absorber of the Court, absorbing and short-circuiting wildcat legislation, as the lightning-rod short-circuits a flash of lightning.

Within their sphere he considered the people supreme, but no further. In matters of finance and in all other technical matters he felt that the people had not sufficient knowledge or information to vote intelligently. For example, on the issue of gold and silver as the basis of monetary value, or on the question of freight rates, that is to say, of the cost to a railroad to transport commodities per ton per mile, he would prefer an opinion of Secretary Mellon or of A. P. Thom, general counsel for the united railroads, to that of the people. Herein lay the difference between Brown and Connor—when Connor decided against the people, it put him to bed; when Brown decided against the people, he went his way rejoicing.

Naturally, such a man was not a reformer; yet the reformers admired him more than they did one another. In truth, if there be one thing the average reformer seems to dislike more than another, it is a brother reformer. It follows, therefore, that Clark, the radical, was closer to Brown, the stand-patter, than to Hoke or Connor, the conservatives. Of Brown, Clark expected nothing, and was not disappointed; of Hoke and Connor, Clark expected much, but often failed to get it. These men would not leave a well-beaten judicial highway to tread an obscure mountain trail. A few years ago, when important rights of Chief Justice Clark were to be adjudged, Justice Brown wrote the opinion, deciding in favor of the Chief Justice. Though Judge Clark and Judge Brown stood at the two ends of the political poles—one a disciple of LaFollette, the other of Grover Cleveland—they were the best of friends, and so were Judge Brown and Josephus Daniels. There may be another reason for this kindly feeling for Judge Brown by the reformers, he was the most impersonal of men—intellectual, thoroughly detached, and unemotional. He never scolded nor fussed; he could sit by and see a man make a fool of himself without losing his temper, or he could write an opinion cutting up some utterly baseless, useless, and absurd case with as much gravity and seriousness as though the matter were of real importance. And yet he had little patience with slipshod methods or with mediocrity. We hear of judges who are patient with young and poorly prepared lawyers—sitting quietly and listening to nonsense by the hour—Brown was not that kind of a judge. The moment a lawyer wandered from the issues, he would call him back, often doing this so brusquely as to give offense. But when the opinion came down it was apparent that Justice Brown had been sounding a proper note of warning.

Judge Montgomery, in an opinion, once said of Justice Brown that of all the Superior Court judges, he was the best. It is easy to understand why a Supreme Court judge should make this statement; the judge of an appellate court likes a case well made up—issues clear-cut, evidence admitted or excluded without hesitancy or dodging. That kind of a trial judge George H. Brown was. Having no judicial hobby to ride, he did not hold court with a brass band. He was neither a candidate for Governor nor Senator. In fact, of him I should say that none surpassed Judge Brown in the performance of his duties as a *nisi pruis* judge. I have never known one to surpass him in the elimination of extraneous matter, and in discovering the real points of a case. The issues culled out by him and put to the jury were sharp and clear-cut, like the edges of a diamond. When going from county to county and holding court he was simply holding court—not teaching Sunday school nor running a chautauqua.

From boyhood up George H. Brown was a leader. At the school of James H. Horner at Oxford, where the lad was a pupil for two years—all the schooling he ever had, by the way—no one surpassed the young fellow. His nickname shows the position he filled—"Magnus Brown," the boys always called him "Great Brown." And great he was. In the first place, he was physically a man, being well proportioned, closely knit together, and the impersonation of power and authority. Some five feet nine inches tall, weighing about one hundred and eighty pounds, dignified, severe, silent, courageous, loyal, no flatterer, with only a handful of friends, because he cared for no more, one may search the annals of the State and not find his match. A remark of Emerson might be applied to Justice Brown, so thoroughly impersonal and detached was he. Speaking of Thoreau, and of his individuality and aloofness, Emerson declared that he would as soon think of offering to walk down the street arm in arm with an elm tree as with Thoreau. As Justice Brown sat on that bench, your honors, and asked some searching question, his rich deep voice had the note of finality. In fact, his voice seemed made to order—voice and head fitting together to a nicety. And such a head! Every feature ample, nose, mouth and ears large, forehead expansive, and a countenance as inscrutable as the Sphinx. His movements were slow and judicial, and though well-groomed, he was thoroughly simple and unaffected. Taking him all and all, he might have sat on the English bench with Mansfield, or on the American bench with Marshall, without loss of dignity or prestige to either. When Rufus Choate was called on to drink to the health of Lemuel Shaw, he responded: "To the Chief Justice! We believe he is ugly, we know that he is great." The latter part of this toast describes Justice Brown.

And no one more looked the part than he. Essentially he was the judge. Speaking few words from the bench, when he did speak it was to the point, and generally a vital point. It has been said of one of the judges of this Court that when he smiled or nodded an approving bow one might be sure he was going to lose his case. Not so with Judge Brown. There was no camouflage about him; one always knew where to find him. Not double-faced, what he professed to be that he was. Unlike the man in the boat, he did not look one way and row another. And he was the essence of loyalty. If you were his friend, behind your back he was more your friend than to your face. He suffered no one to speak ill of his friends or of the principles he stood for.

Not only was Judge Brown a fine specimen of physical manhood, he likewise possessed a vigorous and a remarkably clear intellect. He did not juggle or play tricks with his intellectual processes; he was not everlastingly searching around for some reason to support a false theory. For example, believing that property needs protection as much as persons, in suits for personal injuries, when the injured party was negligent, he opposed mulcting the innocent corporation with damages. While on this bench his opinions were generally short and to the point. To him law was quite simple, law was but a rule and a rigid rule at that. If one followed the rule, he should be protected; if he disobeyed the rule, he should suffer. With judges the emotional often sways the reason, and the law becomes uncertain and variable. Hence, the old maxim, "Hard cases are the quicksands of the law." Judge Brown had no trouble of this kind. Like Chief Justice Ruffin, he was a believer in the letter of the law, in the law as written. Better an occasional hardship through the courts than that the whole system of jurisprudence become a mere game of chance. Hence, Judge Brown adhered to the letter of the law. With him commercial paper was sacred. Notes, bills, bonds, these must be paid, and whensoever a commercial paper got into circulation, having been duly negotiated, it was to Judge Brown a courier without luggage, almost as sacred and indefeasible as United States currency. So as to real estate. In trials of title to land, Justice Brown stood by the ancient landmarks; he was no innovator.

Courts, in their eagerness to give expression to the mores of the people, to put themselves in line with the best thought of the community, often become legislators. Brown never did this. With Bacon, Justice Brown agreed that the province of a judge is to declare the law, not to make it, *discere non facere.* The new idea that judges should not express their own views and convictions, but should search around and find out the wishes of the best element in society, and give expression to the same, regardless of law, he scouted. Satisfied with jurisprudence as it is today, he was not desirous of overturning it, or of falling back on the judicial "recall." His aim was to follow in the footsteps of Ruffin, of Gaston, and of Rodman, and to do this without fuss or feathers. Hence, he wrote no startling opinions. Coke and Blackstone were good enough for him, his only fear being that he could not equal the masters of the law.

During his two years at school under the elder Horner, he learned how to study, how to train his mind. "Old man Jim," as he loved to call his great teacher, taught him to be intensive, not extensive, taught him that one must know *much* and not many things. To those two years Judge Brown ascribed his success in life. Undoubtedly his accuracy, his correctness, and his directness must be ascribed to this period and to this training. Three books of Cæsar, the first book of Livy, and a little of Virgil, was about all the Latin Mr. Horner required. But what he taught, he taught. About fifty lines a day, four days in the week, would be the extent of the week's work. Then on the fifth day, Friday, would come the review. Every line that had been gone over during the week would be reviewed on Friday, and every tense, mood and construction again inquired about and impressed upon the mind of the pupil. Under drilling of this kind, young Brown was put in the way of accurate thinking—when he was only sixteen years old—and until the day of his death continued the process.

There is a French saying that one should have a conscience even in his amusements; that one should not be amused at anything unworthy of laughter. In this high standard Justice Brown concurred. His sense of humor being subtle and selective, buffoonery and coarse jokes he abominated. A good story-teller himself, he was interested in such wit as had a flavor of the Attic or was natural and spontaneous.

Having ideas of the kind I am endeavoring to describe, and yet living in a pragmatical day—a day when the absolute has given place to the relative, perhaps wisely, Justice Brown must be called our Dissenting Judge—he was unwilling to bend the law to meet difficult situations or to win popular favor. Thus he could never bring his logical mind to the point of agreeing that one who is not a party to a contract, though interested in its performance, could sue into the same and recover damages for its breach. Hence, to his way of thinking, there was no legal basis for an action by the citizen of a municipality against a water company when the citizen's property had been burned for lack of pressure, in violation of the terms of the contract between the town and the water company. Cases also involving what is called mental anguish for failure to deliver a telegram made no appeal to Justice Brown; they were illogical in principle and a mere attempt at arbitration. *Lawrence v. Telegraph Co.,* 171 N. C., 240.

Therefore, in a suit against a telegraph company for failing to deliver a message to a laborer announcing the death of a person who, ten years before, had employed plaintiff, Judge Brown dissented from the opinion awarding damages. He was satisfied that it was a fake case. Though the plaintiff testified that "not being a pallbearer at a funeral was grievous to his very mind and soul," Justice Brown could see no basis for a suit. As the learned Justice put it, "the man's agony was of that kind that can only be assuaged by mental solatium." Along the same line he likewise dissented in *Horton v. R. R.*, 169 N. C., 166. In this case, the dissent was based on the idea that the plaintiff assumed the risk of injury from a defective water-glass. As the plaintiff was operating the engine equipped with a standard water-glass, the dissenting opinion reasoned that the injured man was acquainted with the situation, and took employment subject to the same.

In his dissenting opinions, however, Judge Brown was always fair and courteous, ascribing no sinister motives to his brethren. It is a rare gift in a judge to be able to deal with the problems of life impersonally and dispassionately; to sit apart and view the game from the sidelines. And this Judge Brown could do. Being but a cog in the judicial machinery for the divine working out of certain governmental questions, as such and not otherwise, he functioned. If, however, all judges held these immutable views, it might be disastrous to a republican form of government and destructive of democracy; and yet it will be a sad day when the tribe of absolute judges becomes extinct. Without them great business enterprises could not continue to operate.

Judge Brown's mind being simple and direct, he approached legal questions practically and intuitively, in this respect resembling Marshall, Ruffin, and Pearson. The metaphysical and philosophical he was content to leave to Dean Pound of Harvard and Carter of Oxford. The philosophers might busy themselves with far-fetched analogies and subtle distinctions; they might go in search of original sources, but not so Judge Brown. Like a skillful musician, intuitively he detected the slightest false note in judicial ratiocination. Oftentimes, as I have looked at the head of this man as he sat on the bench, seen him busy in his ponderous way, paring off the irrelevant and redundant, eliminating the prelogical and extraneous, eager and intent in the pursuit of truth, unmoved by popular clamor, I have said "there is the biggest brain I ever saw."

But George Brown was not only a man physically and mentally, he was also a man religiously. The dignified and esthetical services of the Episcopal Church, of which he was an occasional communicant, struck a responsive chord in his equally impersonal nature.

One day he and I were discussing the subject of the Hereafter. We had spoken of how inaccountable, how inexplicable everything around about us seemed. What is the origin of matter—the origin of mind? How appalling the immensity of space, the unendingness of time—universality, immortality. I ventured to ask if he believed in a Hereafter and in God. "I certainly do," he replied. Pursuing the subject, I asked him how he reasoned it all out. "I don't reason it out at all," he replied. "I sucked it in with my mother's milk." Up in New York State and at Clifton Springs, where he went sometimes before he died, there was a thorough-going chaplain, a fine old man and one much beloved. Often Judge Brown and he would go alone into the lovely chapel annexed and the good man would repeat some ancient prayer or read a line or two from the Hebrew prophets. So reserved was Judge Brown, he sat so far in the rear of his affections, people generally had little knowledge of the man. His feelings he kept to himself. Yet under a roof in this city where he lived for many years while a Justice of this Court, the youngest child loved him, and many a day the two would go off to John Robinson's circus alone. Aye, not alone, your Honors, there was a third one along, Rilly, the old family cook, as faithful as she was black. Are not the deepest streams those that make least noise? What became of Regan's and Gonerill's professions of love for their father when the old man was in need? Was not Cordelia's love for Lear deeper than theirs? As with Cordelia, so with Brown—chary of protestations of affections, but ample in service of friendship.

> "Unhappy that I am,
> I cannot heave my heart in my mouth.
> I love your majesty according to my bond.
> Nor more nor less."

There is a loyalty of the lips and another loyalty of the heart, and this latter Judge Brown had. Indeed, those who know him best know that he reached the height of loyalty, loyalty to loyalty.

With these sterling virtues Justice Brown would not have been human did he not likewise possess faults, but his faults were the habits and ways of the generation of men to which he belonged; they touched himself only, not his fellow-man. In the discharge of duty he kept himself in splendid form, and no man served the people more faithfully or more efficiently. The faults he had he never concealed, and he enjoined it upon his biographers that they should describe him as he was, that they should paint him true to life—warts and all.

The main facts of Judge Brown's life are few and simple. Though he was quite a politician in early life, serving as chairman of the county executive committee of Beaufort, at one time running for the nomination for Congress, and in 1884 a delegate to the National Convention that nominated Grover Cleveland, he soon tired of this sort of life. When he once became a judge, he was ever afterwards a judge. He was born and died in Washington, North Carolina, the date of this birth being 3 May, 1850, and the date of his death 16 March, 1926. His father was Sylvester T. Brown, lineally descended from Revolutionary ancestors of whom Justice Brown was justly proud. Among these were Captain George Hubbard and General Thomas Holliday. On his mother's side one discovers James Bonner, maternal grandfather, founder of the town of Washington, and Richard Bonner, maternal great-grandfather, the wealthiest citizen of Beaufort County. From him Justice Brown inherited those rare financial gifts by the cultivation of which he became perhaps the best authority in the State, except among the bankers, on the subject of stocks and like securities.

After two years at school, and at the age of eighteen, he secured a position in New York City as a telegraphic operator. Here in a brief time he learned the art of telegraphy, his quickness of mind making him an expert. It is interesting to note that Thomas A. Edison occupied a desk adjoining young Brown in the telegraph office. After remaining in New York some two or three years, the young fellow returned to Wilson, North Carolina, where his parents were then residing; but in a short while removed with his parents to his birthplace in Washington. He now began the study of law under the direction of Chief Justice James E. Shepherd, and in 1872 was duly licensed by this Court in his chosen profession. Shortly thereafter he formed a copartnership with Fenner B. Satterthwaite. This partnership lasted until the death of the senior member, about 1882. At the Washington bar at that time were such imminent lawyers as David Miller Carter, Edward Warren, William B. Rodman, Thomas Sparrow, George Sparrow, James E. Shepherd, and Charles F. Warren. Among these notable men George H. Brown stood deservedly high. His arguments to the jury were expressed in simple words, but clearly and forcefully, the usual tricks of the speaker and the orator he disdained. As a trial lawyer his strength lay "in a retentive memory, a quick mind which immediately detected error in the adversary, in a familiarity with the basic rules of evidence, and in the diligence with which he prepared his cases. He stated his case with precision and based it upon some fundamental proposition of law, citing few authorities." After the death of Mr. Satterthwaite, Judge Brown offered a copartnership to John H. Small, afterwards Congressman for many years from the First District. The partnership of Brown & Small continued until the year 1889, when Judge Brown was elevated to the Superior Court by Governor Scales. Judge Brown was then thirty-nine years of age, and after a service of fifteen years on the Superior Court bench, was elected in 1904 an Associate Justice of this Court. Here he served for sixteen years, retiring on account of ill health in 1920. An acute attack of influenza in 1918 having impaired his vitality, he was not content to serve longer, except upon the assurance that his strength would permit the continuance of the same high type of service. After retiring from the bench, he lived quietly at home in Washington, occasionally holding a special term by appointment of the Governor. During his late days, in fact, during his entire life, he was an omniverous reader, reading rapidly. After the duties of the day were ended, he would retire to his chamber and read current literature until late at night. He was a man that dared to be alone, and who spent much of his time in his library. Among his diversions it may be also mentioned that he was fond of a good horse, and in his earlier days always kept a fine pair of horses for his stables. He was likewise fond of hunting, and oftentimes on the circuit at the end of the week would go out with some friend and spend the week-end hunting birds.

On 17 December, 1874, George H. Brown was married to Laura Ellison Lewis, who was the daughter of Henry A. Ellison and Eliza A. Tripp. Mrs. Brown is of English and French descent, and her ancestors were long associated with the upbuilding and progress of the city of Washington and of Beaufort County. They were possessed with pride and intelligence, and were influential factors in their community, their fine qualities being inherent in their daughter. The married life of Justice Brown and Mrs. Brown embraced more than half a century. She was a partner in his early struggles and a potent factor in his successes and triumphs. Her courage, wisdom and fidelity lightened the obstacles of his life and pointed the way to progress. It is at her request that I now have the honor of presenting to this Court a portrait of the distinguished judge, whose life and character I have undertaken to portray.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF THE LATE ASSOCIATE JUSTICE GEORGE HUBBARD BROWN, IN THE SUPREME COURT ROOM, 12 APRIL, 1927

On 16 March, 1926, at the call of "the evening bell," Judge George H. Brown passed off the stage of action and left, for our keeping, a record of high service to his State and a heritage of great worth to his fellow-man.

For sixteen years, as an Associate Justice of this Court, he labored incessantly, writing just judgments into the "Book of the Law" of a great people. His opinions, invariably concise and to the point, are to be found in forty-four volumes of our published Reports, beginning with the 137th and ending with the 180th.

We concur in the estimate of the speaker that he will take prominent place among the ablest jurists of the Commonwealth. He possessed to a marked degree, not only the gift of words, but also the power of accurate statement. For the profession he served so long and well, his work will stand as his monument. Verily, his clear and forceful expressions have already become beacon lights and guideposts for both Bench and Bar.

The Court is pleased to have this likeness of its former member, whose memory we honor today, and it has heard with gratification the thoughtful and ornate address of Judge Winston. The Marshal will cause the portrait to be hung in its appropriate place on the walls of this Chamber, and these proceedings will be published in the forthcoming volume of our Reports.

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1. *Actions—Misjoinder—Causes of Action—Insurance—Release—Fraud—Pleadings—Demurrer—Statutes.*—Where the complaint alleges two causes of action, one against a defendant for negligence in proximately causing the injury in suit, and the other against an indemnity company whose policy of insurance covers the accident, and certain of its employees, for fraudulently obtaining a release from liability set up as a defense: *Held*, though a recovery may not be had against the defendants under the second alleged cause of action, they are necessary parties to the same cause of action, and a demurrer for misjoinder of parties and causes of action is bad. C. S., 456, 507, 535. *Killian v. Hanna*, 17.

2. *Actions—Damages—Evidence—Value of Lands Before and After a Time Fixed.*—Where the reasonable market value of lands is relevant to the issue as to plaintiff's damages at a certain time, such value before and after that time, within reason, is competent. *Greene v. Bechtel*, 94.

3. *Actions—Parties—Subject-Matter—Demurrer—Pleadings—Amendments—Statutes—Severance of Action.*—An action will not be dismissed upon demurrer to the complaint on account of a misjoinder of parties and causes of action when the causes of action alleged against the several defendants grow out of a common liability, or the same subject of action or transaction connected with the same subject of action, and in proper instances the court will require the pleadings to be made more definite by amendment, C. S., 537, or the court may decide that several causes of action have been improperly joined and allow the pleadings to conform thereto upon such terms as are just, and order the action to be divided into as many actions as are necessary for the proper determination of the controversy. C. S., 516. *S. v. McCanless*, 200.

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6. *Actions—Controversies Submitted Without Action—Statutes—Interpretation.*—The requirements of our statute, C. S., 626, must be strictly observed to submit a controversy without action to the court for decision, and where it does not sufficiently appear, among other things, that the controversy was real or in good faith, it will be dismissed. *Finney, Receiver, v. Corbett*, 315.

7. *Actions—Executors and Administrators—Courts—Jurisdiction—Transfer of Causes—Removal of Causes—Motions.*—An action against one who has qualified as administrator of the deceased to recover money collected upon his policy of life insurance, among other things for services rendered the deceased by the plaintiffs during his life time, is an action against the defendant in his capacity of administrator, and not against him personally, and should be removed on proper motion to the court in the county wherein letters testamentary were granted. C. S., 465. *Montford v. Simmons*, 323.

8. *Actions—Parties—Bills and Notes—Negotiable Instruments—Holder—Endorsements—Pleadings—Demurrer.*—Only the holder in due course can maintain an action on an unpaid check given by the maker of the note, and where it affirmatively appears from the complaint in an action by the original payees who have discounted the note at the plaintiff's bank with the payee's endorsement, that the check so given remained unpaid on account of the insolvency of the bank on which it was drawn, without further allegation that plaintiff had made good the check or otherwise had suffered loss, a demurrer thereto will be sustained, the right of action being alone to the bank who had discounted the note and had received the unpaid check. *Morris v. Cleve*, 389.

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10. *Same—Limitations of Actions—Statutes—Parties—Amendments—Husband and Wife.*—Where a note is made to the husband and his wife as joint payees, and the action thereon is brought by the husband alone, an amendment joining the wife as a party to the action (C. S., 547), after the running of the statute of limitations is in effect the bringing of a new action, which also will be barred. C. S., 446, 511. *Ibid.*

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ANSWER. See Appeal and Error, 5.

APPEAL AND ERROR. See Criminal Law, 1, 2, 5, 11, 15, 16, 22; Actions, 11; Evidence, 2, 6, 7, 10, 13, 23, 24, 31; Homicide, 2, 6, 16, 20; Instructions, 1, 2, 3, 4, 6, 7, 11, 12, 13, 14, 15; Insurance, 5; Damages, 1, 3; Municipal Corporations, 1; Negligence, 3, 6, 16, 22; Pleadings, 1; Bastards, 1; Courts, 6; Divorce, 1; Deeds and Conveyances, 11; Judgments,

APPEAL AND ERROR—*Continued.*

14, 15, 17, 19; Issues, 1; Reference, 1, 3; Removal of Causes, 11; Eminent Domain, 4, 5; Trials, 1; Tenants in Common, 2; Master and Servant, 2; Clerks of Court, 2.

1. *Appeal and Error—Criminal Law—Homicide—Corpus Delicti.*—Upon conviction of murder in the first degree, the record on appeal must show the *corpus delicti. S. v. Ross,* 25.

2. *Appeal and Error—Injunction—Evidence—Review.*—Upon appeal the Supreme Court may review the evidence upon which the Superior Court judge has acted on the hearing before him, and continued the restraining order. *Wentz v. Land Co.,* 32.

3. *Appeal and Error — Case — Dismissal—Record Proper—Affirmance of Judgment.*—Where the record on appeal contains no case settled, the appeal may be dismissed, or the Court may affirm the judgment of the lower court if no error appears upon examination of the record proper. *Springer v. Springer,* 35.

4. *Appeal and Error—Grounds for Appeal—Trials—Different Theories.*—Where the appellant has tried his case in the Superior Court on one theory, he may not successfully insist on appeal that error was committed by the lower court upon an entirely different one. *Pennell v. Brookshire,* 73.

5. *Appeal and Error—Unresponsive Answers—Evidence—Motions.*—Where an answer to a question asked a witness on cross-examination is not responsive to the question asked, objection must be taken by motion to strike out the answer, and an exception to the denial thereof, for it to be considered on appeal. *Ibid.*

6. *Appeal and Error — Issues — Objections and Exceptions.*—Where the issues submitted by the court to the jury are fully determinative of the controversy without prejudice to either party, affording them opportunity to introduce all legal evidence properly involved in the controversy, and are sufficient to support a judgment, the appellant may not complain that other issues should have been submitted without being aptly tendered to the court. *Greene v. Bechtel,* 94.

7. *Appeal and Error—Reference—Evidence—Findings of Fact—Review.*—When exceptions have been filed to the referee's report and thereupon the judge finds the facts upon such exceptions, such findings are not reviewable in the Supreme Court on appeal if there is evidence to support them. *London v. Comrs. of Yancey,* 100.

8. *Appeal and Error—Insurance, Accident—Misrepresentations.*—Where a policy of accident insurance has been issued and accepted by the insured, nothing else appearing, the insured may not contend on appeal that the policy differed materially from the one applied for, when such right has not been properly presented upon the trial. *Clark v. Ins. Co.,* 166.

9. *Appeal and Error—Injunction—Evidence—Conclusions of Fact—Burden of Proof.*—In the Supreme Court, an appeal in injunction is not confined to the facts found by the Superior Court judge upon the evidence of record, but the burden is on the appellant to show error therefrom. *Angelo v. Winston-Salem,* 207.

APPEAL AND ERROR—*Continued.*

10. *Appeal and Error — Evidence — Objections and Exceptions.*—The Supreme Court on appeal will not pass upon the question of the admissibility of evidence not objected to on the trial. *S. v. Maragousis*, 246.

11. *Appeal and Error—Evidence—Motions to Strike Out Evidence—Exceptions.*—Where a question asked a witness on the trial of an action is competent, exception to his answer when incompetent in part, should be taken by motion to strike out the part that is objectionable, and an appeal then taken to the refusal of the judge to do so. *Luttrell v. Hardin*, 266.

12. *Appeal and Error—Instructions—Record—Presumptions.*—Where upon appeal to the Supreme Court the charge of the trial judge does not appear of record, it is presumed to have been correctly given. *Spinks v. Ferebee, Mayor*, 274.

13. *Appeal and Error—Review.*—Ordinarily the Supreme Court can only review the case upon matters of law or legal inference. *Ibid.*

14. *Appeal and Error—Partition—Conflicting Findings—Reversal Without Prejudice.*—Where a tenant in common of lands pending proceedings for division has conveyed his interest to a stranger, by deed duly recorded, and the question is whether the purchaser took without actual or constructive notice of an owelty charge against it, and the findings of the trial judge are conflicting as to whether the purchaser took with implied notice in the pending proceedings for partition, the judgment of the court as a matter of law that the purchaser took with notice of the owelty charge will be reversed, without prejudice to the parties, to apply for more definite or specific findings of facts. *Wilson v. Burroughs*, 318.

15. *Appeal and Error—Instructions—Record—Presumptions.*—Upon appeal from an exception to the instructions of the court, the charge as appears of record will be taken as correct when it is not therein set out in full. *S. v. Lee*, 321.

16. *Appeal and Error—Time Agreed for Settlement of Case—Rules of Court—Order of Court—Certiorari—Motions.*—Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and countercase, etc., that will prevent its being docketed in the time prescribed by Rule 5, regulating the docketing of appeals, and consequently no case has been yet settled by the trial judge, appellant's motion in the Supreme Court for a writ of *certiorari* will be denied. *Waller v. Dudley*, 354.

17. *Appeal and Error—Division as to Opinion—Judgments.*—Where the Justices of the Supreme Court are equally divided in their opinions on appeal, the judgment of the Superior Court will be affirmed. *Raynor v. Ins. Co.*, 385.

18. *Appeal and Error—Statutes—Repealing Statutes—Constitutional Law.*—The later repeal of a statute attacked for its alleged unconstitutionality renders unnecessary the decision of the Supreme Court on the facts of this case. *Wilson v. Comrs. of Guilford*, 386.

19. *Appeal and Error—Pleadings—Evidence—Insufficient Record — New Trials.*—It appearing in this case on appeal that taking the allegations of the complaint into consideration with the indefiniteness of the

APPEAL AND ERROR—*Continued.*

record of the trial upon the question of want of authority for the cancellation of a mortgage on the books of the register of deeds creating a lien upon lands subsequently conveyed, that a disposition of the case would be unsatisfactory, a new trial is ordered. *Williams v. Cox*, 401.

20. *Appeal and Error—Reference—Evidence—Review—Presumptions.*—The facts found by the referee upon sufficient legal evidence, approved by the trial judge, are not reviewable by the Supreme Court on appeal, and where the evidence is not set out in the record, the findings by the trial judge are presumed to be sustained by sufficient evidence. *Wadford v. Gillette*, 413.

21. *Appeal and Error—Presumptions—Burden of Proof—Evidence—Questions and Answers—Unanswered Questions.*—The presumptions are in favor of the correctness of the rulings of law of the Superior Court, with the burden upon appellant to show error therein, and upon the refusal of the trial judge to admit in evidence answers to questions asked of the witness, it must be made to appear what the answers of the witness would have been so that the Supreme Court may pass upon its relevancy and materiality. *Rawls v. Lupton*, 428.

22. *Appeal and Error—Instructions—Exceptions—Statutes—Rules of Court.* Exceptions to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must be made to appear in some appropriate and recognized way that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. C. S., 643. *Ibid.*

23. *Appeal and Error—Questions of Law or Legal Inference—Constitutional Law.*—Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Const. of North Carolina, Art. IV, sec. 8. *Ibid.*

24. *Appeal and Error—Certiorari—Motions—Record Proper.*—It is uniformly required that the statute must be complied with that the appellant aptly file a record proper in the case appealed from as a prerequisite for the Supreme Court to grant his motion for a *certiorari* to bring up the case for review. *Brock v. Ellis*, 540.

25. *Appeal and Error—Presumptions—Burden of Proof.*—On appeal to the Supreme Court, the presumption is in favor of the correctness of the trial in the Superior Court, with the burden on appellant to show error. *Carstarphen v. Carstarphen*, 541.

26. *Same—Prejudicial Error.*—In order for appellant to be awarded a new trial on appeal to the Supreme Court, it must not only be made to appear that technical error has been committed in the lower court, but that it was of a character so prejudicial to appellant that a different verdict might otherwise reasonably have been rendered. As to whether an estoppel should have been pleaded in this action of ejectment, *quære*. *Ibid.*

27. *Appeal and Error—Judgments—Excusable Neglect—Findings of Fact.*—Upon motion of defendant to set aside a judgment for surprise, excus-

APPEAL AND ERROR—*Continued.*

able neglect, etc., a finding by the Superior Court judge that the movant had not been made a party to the action, upon sufficient evidence, is binding upon him when he has not excepted or appealed. *Strickland v. Shearon*, 599.

28. *Appeal and Error—Evidence—Instructions—New Trials.*—Prejudicial evidence erroneously admitted on the trial to the appellant's prejudice, recited in the charge as one of appellee's contentions, and recognized in the charge as having a material bearing upon the result of the issue, is reversible error. *Credit Corp. v. Boushall*, 605.

29. *Appeal and Error—Objections and Exceptions—Instructions.*—Where it is contended on appeal that the court erroneously instructed the jury upon the evidence of the case, the appealing party must aptly except to the instruction or a refusal of a proper prayer therefor, or it will not be considered on appeal. *S. v. Branch*, 621.

30. *Appeal and Error—Instructions—Harmless Error.*—Where, upon the trial for a homicide, the defendant is convicted of murder in the second degree, an exception to a charge on the issue of murder in the first degree is not prejudicial error. *Ibid.*

31. *Appeal and Error—Supreme Court Equally Divided in Opinion—Judgments — Records — Liens—Deeds and Conveyances.*—The Supreme Court being equally divided on this appeal, *Adams, J.*, not sitting, as to whether a mortgage on real estate is sufficiently registered when placed in a chattel mortgage book by the register of deeds, who kept a separate book for such purpose, the judgment of the Superior Court that such registration was not sufficient is affirmed. *Bank v. Harrington*, 625.

32. *Appeal and Error—Judgments—Erroneous Judgments.*—An appeal or *certiorari* is the procedure to correct a judgment claimed to have been erroneously entered. *Thomas v. Watkins*, 630.

33. *Appeal and Error—Instructions—Record—Presumptions.*—Where the charge of the court to the jury does not appear in the record of the case on appeal, the presumption is in favor of its correctness on every phase of the law arising under the evidence. *Barber v. R. R.*, 691.

34. *Appeal and Error—Objections and Exceptions—Evidence—Broadside Exceptions — Instructions — Issues—Negligence.*—Where evidence is competent to be considered by the jury upon one of the issues properly submitted, and not upon another, the appellant must aptly request the trial judge to confine it to the proper issue in order to avail himself of his exception on appeal. *Ibid.*

35. *Appeal and Error—Instructions—Presumptions.*—Where the instructions of the trial judge to the jury are not made to appear in the record on appeal, they will be presumed to have been correctly given. *S. v. Johnson*, 701.

36. *Appeal and Error—Harmless Error—Instructions—Evidence.*—Where the judge in his instructions to the jury correctly refers to evidence, but as having been testified to by a witness by name, whose name does not appear in the record on appeal, an exception taken for the first time in the Supreme Court will not be considered. *Ibid.*

APPEAL AND ERROR—*Continued.*

37. *Appeal and Error—Objections and Exceptions—Briefs.*—Exceptions not referred to in the appellant's brief will be deemed to have been abandoned on appeal. *Ibid.*

38. *Appeal and Error—Rehearing—Judgments—Principal and Surety.*—Where it is made to appear that the surety on a bond has not been given a judgment against its principal, and it is necessary for the protection of its legal rights, and upon his exception duly entered the Supreme Court on appeal has inadvertently omitted to pass on this exception, his petition to rehear upon this point will be granted and the proper relief afforded. *Loan Asso. v. Davis*, 710.

39. *Appeal and Error—Record—Pleadings—Dismissal—Statutes.*—The rule requiring that the pleadings be made a part of the record on appeal is mandatory, and the appeal will be dismissed when not complied with, and the certificate of the Superior Court clerk that a pleading had been lost in his office will not avail the appellant when it does not appear that a substitution cannot be made under the provisions of the law. C. S., 544. *Walden v. Cheek*, 744.

40. *Appeal and Error—Case—Signature of Judge—Judgment Affirmed—Record—Courts—Ex Mero Motu.*—Where it appears from the record that the judge has not signed what appears to be his settlement of the case, and no agreed case has been included, and where the appellee has not made a motion to affirm the judgment the court, in the absence of error appearing in the record proper, will not be disposed *ex mero motu* to exercise its power to do so. *Waller v. Dudley*, 749.

41. *Appeal and Error—"Case"—Settlement of Case—Duty of Appellant—Redrafting of Case—Signature of Judge.*—It is required of the appellant to redraft the case on appeal when the judge in settling it has modified his case by adopting portions of the exceptions or countercase of the appellee, etc., and have the judge to sign the case so redrafted and incorporate it in the record. C. S., 642, 643, 644. *Ibid.*

42. *Same—Remand—Printing.*—This appeal is remanded to the end that the appellant may have the "case" on appeal signed by the trial judge or do so after making such changes therein as will make it conform to the case as tried, the appellant using in this instance the printing in the present record, if so advised, to the extent reasonably available. *Ibid.*

43. *Appeal and Error—Negligence—Malpractice—Physicians and Surgeons—Harmless Error.*—Where the plaintiff was a patient of the defendant physician and sues him for damages for malpractice in performing an operation for hernia, basing his right to recover solely on defendant's negligence in stitching up some of the plaintiff's intestines in closing the incision, causing the necessity of a second operation and serious and permanent injury, testimony of a witness as to the precautions to be observed to prevent a recurrence of the hernia given him in an entirely unrelated operation for hernia on himself, at the same hospital and by a different surgeon, is erroneously admitted, but harmless and without prejudice to the plaintiff, under the facts of this case. *Ross v. Brenizer*, 798.

44. *Appeal and Error—Constitutional Law—Matters of Law—Verdict.*—Under the provisions of our State Constitution, the Supreme Court is

APPEAL AND ERROR—*Continued.*

confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the Superior Court, and it may not otherwise pass upon the verdict of the jury as to facts proven by the evidence. Constitution of N. C., Art. IV, sec. 8. *Robinson v. Ivey*, 805.

45. *Appeal and Error—Briefs—Assignments of Error.*—In order to comply with Rule 28, regulating appeals to the Supreme Court, the briefs should "properly number the several grounds of exception and assignments of error with reference to the printed pages of transcript and cite the authorities relied on classified under such assignment." *Chamberlain v. Dyeing Co.*, 849.

46. *Appeal and Error—Burden of Proof—Evidence—Questions and Answers.* The burden is on appellant to show error on appeal, and where he has excepted to the exclusion of evidence, he must show its nature, and that he has thereby been prejudiced. *Mason v. Andrews*, 854.

APPEARANCE BOND. See Bastards, 1.

APPLICATIONS. See Insurance, 15; Officers, 1.

APPOINTMENT. See Courts, 5.

APPRAISAL. See Homestead, 1.

APPROVAL. See Insurance, 8; Judgments, 4.

ARBITRATION AND AWARD. See Receivers, 3.

1. *Arbitration and Award—Estoppel—Extraneous Matters—Actions—Fraud—Architects.*—Where an architect for the erection of a hotel has agreed that his compensation shall be paid partly in cash and partly in stock of a certain corporation to be formed for a land development by the owner, and under the terms of the contract an arbitration has been had awarding him so much in cash and so much in stock therein, and the defendant sets up the award as final, upon the plaintiff's allegation of fraud, it may be shown by him that the defendant had not conveyed the land to the corporation designated according to his agreement, but to another corporation, and that the shares designated in the award were worthless in consequence. *Greene v. Bechtel*, 94.

2. *Arbitration and Award—Optional With Either Party—Contracts—Actions.*—Where a contract provides for arbitration in case of a dispute as to compensation between the owner of a building and his architect, to be demanded at the option of either party, the architect may maintain his action on the contract for services rendered by him thereunder, when neither party has exercised this right. *Ibid.*

3. *Same—Pleadings—Amendments—Objections and Exceptions—Contracts—Fraud.*—Where the defendant in an action upon contract defends solely upon the plaintiff's estoppel by an award by arbitration therein provided for, and without exception the court has allowed the plaintiff to amend by setting up fraud resting by parol in connection with the subject, the defendant may not successfuly resist judgment for plaintiff under the amended complaint. *Ibid.*

ARCHITECTS. See Arbitration and Award, 1.

ARREST AND BAIL. See Criminal Law, 15.

1. *Arrest and Bail—Partnership—Misappropriation of Funds—Accounting—Reference.*—In matters of partnership one of the parties may not recover in an action against the other for misappropriation of partnership funds until a balance has been struck, or some definite amount has been legally ascertained to be due the plaintiff, and where the controversy requires a reference to ascertain whether any amount is due by the defendant, it is reversible error for the trial judge to order his arrest, and require a bail bond from him. *Pugh v. Newbern*, 258.

2. *Arrest and Bail—False Arrest—Malice—Issues—Questions for Jury.*—In order to issue execution against the person of the defendant in an action to recover damages for false arrest, an issue upon the fact of actual or express malice must have been submitted to and affirmatively found by the jury. *Harris v. Singletary*, 583.

3. *Arrest and Bail—False Arrest—Termination of Criminal Action—Evidence—Judgment.*—It is necessary for the plaintiff in an action to recover damages for false arrest, to show the successful determination of the criminal action, and the judgment thereon is properly admitted in evidence when confined to the required purpose. *Ibid.*

4. *Arrest and Bail—False Arrest—Malice—Evidence—Criminal Law.*—Where the prosecutor in a criminal action has appealed from an adverse judgment of a justice of the peace taxing him with costs, and has afterwards withdrawn his appeal and paid the cost, it is sufficient evidence of malice, etc., to be submitted to the jury. *Ibid.*

ASSESSMENTS. See Banks and Banking, 1; Drainage Districts, 1, 5, 6, 9, 11; Municipal Corporations, 3.

ASSETS. See Banks and Banking, 1, 2, 4.

ASSIGNMENT. See Debtor and Creditor, 1.

ASSIGNMENT OF ERROR. See Appeal and Error, 45.

ASSUMPTION. See Deeds and Conveyances, 12; Mortgages, 3.

ATTACHMENT. See Courts, 8; Interpleader, 1.

1. *Attachment—Statutes—Sheriffs.*—Attachment partakes of the nature of an execution before judgment, giving the sheriff an interest in the property seized for the protection of all the parties therein interested, and giving the defendant the right to replevin by conforming to the requirements of the statute. C. S., 807. *Saliba v. Mother Agnes*, 251.

2. *Same—Preservation of Property—Plaintiff's Use of the Property—Indemnity.*—It is the intent of our statutes to preserve property attached, to the end that its value may not be diminished and subject to be sold only under certain statutory provisions; and an order of the trial judge permitting the plaintiff to repossess and use the property under an indemnity bond, pending the litigation, is reversible error. C. S., 807, 824, 812. *Ibid.*

3. *Attachment—Garnishment—Court's Jurisdiction.*—Attachment of the property of nonresident defendants in this State is a proceeding *quasi in rem*, for the purpose of bringing him under the jurisdiction of the State Court for the purpose of determining the controversy in the action brought against him, when properly constituted. *Mohn v. Cressey*, 568.

ATTORNEY AND CLIENT. See Judgments, 8; Deeds and Conveyances, 7; Corporations, 13; Criminal Law, 22.

1. *Attorney and Client—Contracts.*—After the termination of services rendered by an attorney to the client, a transaction by which the former accepts a note from his client in payment for such services is valid and enforceable by the attorney. *Ellis v. Poindexter*, 565.

AUTHORITY. See Principal and Agent, 1.

AUTOMOBILES. See Negligence, 1, 2, 4, 6, 8, 11.

AYE AND NO VOTE. See Constitutional Law, 11.

BAIL. See Arrest and Bail.

BAILMENT. See Banks and Banking, 5; Evidence, 32.

1. *Bailment—Contracts—Insurer.*—By special contract between the bailor and bailee, the liability of the latter may be enlarged to that of insurer, and he may be held responsible for cotton stored by it in its warehouse as bailee, and stolen therefrom. *Lacy v. Indemnity Co.*, 179.

2. *Same—Warehouseman—Negligence.*—Where, under a contract of bailment the bailee receives certain bales of cotton and stores them in his warehouse, under agreement to return the identical bales upon return of the warehouse receipts in the manner provided in the contract, the liability of the bailee is that of insurer, and it is liable in damages when it is prevented by theft from performing its contract, though without negligence on its part. *Ibid.*

3. *Same—Statutes—Cotton Warehouses—State Treasurer.*—Under the provisions of the statute to provide improved marketing facilities for cotton, C. S., 4907 *et seq.*, and the rules and regulations made by the State Board of Agriculture in pursuance thereof, 3 C. S., 4925 (b), and the warehouse receipts, made negotiable by statute, etc., 3 C. S., 4925 (k), the warehouseman's liability to the State after it has paid the bailor for his stolen cotton, or the one entitled by the proper transfer of the certificate, is not dependent upon the exercise of due care by the warehouseman, or the absence of negligence by its employees or agents, for within the intent and meaning of the statute the liability of the warehouseman is that of insurer. *Ibid.*

4. *Bailment—Warehousemen—Act of God—Fires—Insurance—Damages.*—Where a milling company has received cotton for storage with each bale marked for identification, and thus mentioned in its warehouse receipt, and cotton in the warehouse, including that of the plaintiff, has been destroyed by fire resulting from lightning or other cause not within the control of the defendant, and the defendant has collected a part of the value of the plaintiff's cotton thus destroyed under a blanket policy of fire insurance: *Held*, a retention of the insurance money is a wrongful conversion of the plaintiff's property, and he may recover the amount thereof unaffected by the fact that the defendant had substituted the bales destroyed with cotton of the same grade, and that the price of cotton had declined from the market value at the time of the fire. *Edwards v. Power Co.*, 780.

5. *Same—Actions—Cotton.*—One who stores cotton upon a consideration in the warehouse of another, which the warehouseman has insured,

BAILMENT—*Continued.*

and the cotton has been destroyed by the act of God and not through any negligence on the part of the latter, the one who stored the cotton acquires rights under the policy of insurance against the warehouseman, and he may recover against the warehouseman the amount paid him by the insurance company. *Ibid.*

6. *Same—Liability of Warehouseman as Insurer—Policies—Contracts.*—Where a cotton storage warehouse contract identifies the particular bales stored with it, and by its contract agrees to deliver them subject to storage charges: *Held*, by interpretation of the contract the warehouseman was obligated to return the identical cotton and not an equal number of bales of the same quality, and where the cotton has been destroyed by the act of God, etc., or a cause beyond the warehouseman's control, the plaintiff in his action for conversion may recover the market value of his cotton, defendant having spun the cotton, and the question of substitution by other cotton that the cotton was fungible has no application. *Ibid.*

7. *Same—Evidence—Questions for Jury.*—Where the evidence is conflicting as to whether the plaintiff in his action of conversion had agreed to accept cotton of the same quality, etc., as that destroyed when in storage in defendant's warehouse by fire set out by lightning, etc., instead of the identical bales agreed upon in the warehouse contract, an issue arises thereby for the jury to determine. *Ibid.*

BANKS AND BANKING. See Bills and Notes, 2, 4; States, 1; Debtor and Creditor, 2.

1. *Banks and Banking—Receivers—Assessment of Stockholders—Assets—Liabilities.*—The shareholders in an insolvent bank in the hands of a receiver may not be assessed by their additional liability to the par value of their shares until the value of the bank's assets in proportion to its debts has been ascertained. *Corporation Commission v. Bank*, 113.

2. *Same—Officers—Mismanagement—Assets.*—The right of action by the bank, and by its receiver, in case of insolvency for loss or depreciation of the bank's assets, due to their willful or negligent failure to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and where the receiver has sued the shareholders of its stock for their additional or personal liability, the defendants setting up this defense as an asset of the bank, are entitled to have the officers' or directors' liability determined before the amount of their liability by assessment may be fixed. C. S., 237, 239, 240. 3 C. S., 219 (a). *Ibid.*

3. *Same—Fraud—Misrepresentation in Sale of Shares.*—Upon the issue raised in an action by the receiver of an insolvent bank to enforce individual or personal liability of its shareholders: *Held*, the defense that his subscription was obtained by the fraudulent representations of an officer of the bank as to its solvency, is controlled by *Chamberlain v. Trogden*, 148 N. C., 139. *Ibid.*

4. *Banks and Banking—Depositors—Debtor and Creditor—Receivers—Assets—Agreements—Trusts—Priority of Payment.*—Where money is deposited in a bank, without agreement with the bank that it was to be held for a specified purpose or segregated from its other deposits

BANKS AND BANKING—*Continued.*

therefor, the deposit is a general one and becomes a part of the bank's assets, subject to checks of its other depositors, and not a naked bailment requiring that it be kept intact as a trust for a certain designated use, and as a general deposit, it is not entitled to priority of payment over the other like creditors of the bank in the hands of a receiver. *Corporation Commission v. Trust Co.*, 696.

5. *Same — Trusts — Bailment—Title—Priority of Payment.*—Where, by agreement with its depositor, a bank receives a deposit to be applied only to a debt of the depositor to another, a naked bailment arises as a matter of law, and the bank does not acquire title, and is liable for its misapplication to the payment of the checks of other general depositors out of its assets, which liability passes to its receiver in insolvency, creating a preference. *Ibid.*

6. *Same—Trustee's Breach of Trust—Following Trust Property—Innocent Purchaser or Transferee.*—Where a bank has converted money upon special deposit with it as a trust fund by commingling it with its assets and paying it out upon the checks of its general depositors, and has since become insolvent and in a receiver's hands, the special depositor may claim a preference of payment out of the funds in his hands under the equitable principle that a trust fund, when converted to other purposes, may be followed unless transferred to a bona fide purchaser or assignee for value, without notice. *Ibid.*

7. *Same—Evidence—Questions for Jury—New Trials.*—Where suit is brought to subject the assets of a bank in a receiver's hands to the payment of a special deposit as a preference over other deposits, or the claims of its general creditors, and the evidence is conflicting as to whether a trust fund had been created by the agreement of the parties, the question is one for the jury, and an instruction in effect directing a verdict upon the evidence is reversible error upon which a new trial will be granted. *Ibid.*

8. *Banks and Banking—Bills and Notes—Negotiable Instruments—Depositors—Debtor and Creditor—Offset—Corporations—Insolvency.*—Where the directors of a corporation, in their endeavor to prevent its insolvency, make a cash payment on the matured corporation note given to the bank, and give their individual note for the balance, the bank retaining the old note as collateral, upon the corporation's becoming insolvent and in a receiver's hands, under the relationship of debtor and creditor, the bank has a right in equity to offset the indebtedness on the note of the corporation deposited therein, though the note given by the directors may not have become due at the time. *Trust Co. v. Spencer*, 745.

9. *Banks and Banking—Double Liability—Transfer of Shares of Stock—Registration—Notice.*—Depositors and creditors have a right to look to those whose names appear on the books of the bank as having stock therein for the amount of the statutory liability, 3 C. S., 219 (a), and a person having stock issued to him in his own name, and it so appears upon the books, cannot escape such liability on the ground that in fact he held said stock as trustee for an undisclosed *cestui que trust*, and that the officers of the bank knew of the trusteeship, since notice to the officers of the bank is not notice to the depositors and creditors thereof. *Trust Co. v. Jenkins*, 761.

BANKS AND BANKING—*Continued.*

10. *Same—Shares of Stock—Vendor and Purchaser—Sales—Notice.*—It is required of a person selling shares of stock of a bank, to escape personal liability under the provisions of 3 C. S., 219 (d), to surrender the possession of the shares to be transferred to the proper officials of the bank in order that they may be properly transferred on the books to the purchaser. *Ibid.*

11. *Same—Principal and Agent.*—Where the laws under which a corporation transfers its shares of stock requires that the transfer from seller to the purchaser be in person by the seller, or authorized in writing, the purchaser as agent for the seller in this respect must conform to this requirement. *Ibid.*

12. *Same—Leaving the Certificates with the Bank for Purposes of Transfer.* In order to require of the proper officers of the bank to transfer its shares from one appearing upon its books as an owner to the purchaser, the one having authority to do so must meet every reasonable requirement of the bank, and his failure to leave with its officers the shares in question for them to make the transfer requested will not relieve the one whose name appears on the books as the owner from personal liability provided by statute. *Ibid.*

BANKRUPTCY. See Usury, 1.

BASTARDS.

1. *Bastards—Principal and Surety—Appearance Bond—Appeal and Error.* The surety on the appearance bond of the defendant in bastardy proceedings appealed from a justice of the peace to the county court and there remanded for want of jurisdiction, may insist upon the exact terms of his bond; and where the defendant has been legally convicted and has served his term as the law provides on failing to pay the allowance made to the prosecutrix, costs, etc., the provisions in the appearance bond as to the surety's liability has been discharged. C. S., 267, 270; 3 C. S., 273. *S. v. Carnegie*, 467.

BENEFICIARY. See Insurance, 2.

BENEFITS. See Drainage Districts, 9; Municipal Corporations, 1.

BETTERMENTS. See Deeds and Conveyances, 16.

BIDS. See Sales, 1.

BILLS AND NOTES. See Evidence, 9; Actions, 8, 9; Contracts, 9; Sales, 5; Banks and Banking, 8.

1. *Bills and Notes—Negotiable Instruments—Actions—Parties—Statutes.* The holder of a negotiable instrument in due course for value may maintain an action thereon in his own name as the real party in interest, and a payment to him is a discharge of the instrument, C. S., 3032; but when the holder in due course by endorsement is a bank, and has received it only for collection, action on the instrument must be brought by the endorser. C. S., 446, 3017, 3018. *Bank v. Rochamora*, 1.

2. *Same—Banks and Banking—Agencies for Collection—Principal and Agent.*—Where a bank receives a negotiable bill of exchange from its

BILLS AND NOTES—*Continued.*

depositor, and the instrument is endorsed to the bank, as in due course, the presumption raised by the statute is that the bank, among other things, was a purchaser for value, and a prima facie case is thereby raised sufficient to take the case to the jury, with the burden of the issue remaining with the bank, the plaintiff in the action. *Ibid.*

3. *Same—Evidence—Questions for Jury.*—Evidence that the plaintiff bank received from its depositor a bill of exchange endorsed to it, under the custom of taking such instruments with the right to receive the depositor's check in the event of nonpayment, and without any knowledge of or inquiry into the financial responsibility of the payor, is sufficient evidence to take the case to the jury upon the question as to whether the bank accepted the instrument for collection only. *Ibid.*

4. *Bills and Notes — Negotiable Instruments — Banks and Banking — Renewal Notes — Duress — Fraud — Evidence.*—Evidence that a bank agreed to give an extension of time by a renewal note it held against the plaintiff upon the condition that he would endorse another note it held from a different maker, and threatened to immediately sue upon the past due note of the defendant, is only of a lawful act on the part of the bank, and is not sufficient of duress or fraud in the procurement of the defendant's endorsement of the note to the other payee to avoid the defendant's liability thereon as an endorser. *Bank v. Smith,* 141.

5. *Same—Consideration.*—Where the bank has the right to sue its payee upon a past due paper, its parol agreement to extend the time of payment by a renewal note is without consideration and unenforceable. *Ibid.*

6. *Bills and Notes—Negotiable Instruments—Extension of Time—Contracts—Consideration.*—The time of payment of a negotiable instrument may be extended by a proper agreement between the parties upon a valuable consideration for a definite period of time. *McInturff v. Gahagan,* 147.

7. *Bills and Notes—Negotiable Instruments—Renewal—Payment—Fraud — Verdict — Endorsement — Due Course.*—Two notes given by the maker with endorsements thereon were acquired for value and before maturity by plaintiff bank, which accepted the note in suit in their places in a sum to cover the entire amount. The defense interposed was that plaintiff bank with notice of the fraud practiced in the original note conspired to release the parties thereon bound by taking the note in suit directly to itself with threats to bring suit upon the original two notes which the defendant could not withstand. Upon the verdict establishing that there was no fraud practiced in the procurement of the original two notes: *Held,* the plaintiff bank was a holder in due course and could maintain its action whether the note it had obtained was given either in renewal or in payment of the notes it replaced. *Bank v. Wilson,* 151.

8. *Bills and Notes—Negotiable Instruments—Payment—Endorsement—Holder in Due Course — Actions — Parties — Pleadings—Demurrer.*—Where there are allegations and evidence that an attorney at law lends his money and secures the note given therefor by a mortgage

BILLS AND NOTES—*Continued.*

on the maker's lands, and after maturity the plaintiff becomes the holder in due course for value by endorsement from the original payee, and the maker has paid the note to the original payee and the papers have been canceled of record, and after personal notice, the plaintiff has collected certain payments from the payee of the note and credited them upon his other obligations to the plaintiff: *Held*, sufficient to raise the issue of election by the plaintiff to proceed against the original payee of the note, or the maker of the note and mortgage. *Darden v. Baker*, 386.

9. *Bills and Notes—Negotiable Instruments—Contracts, Written—Evidence—Parol Evidence—Notice—Equities.*—A bank discounting a note with notice that the payee has on hand merchandise of the maker which was to be sold for the payment of the note, takes the note subject to this particular mode of payment, and parol evidence of this agreement in the holder's action thereon against the maker is not contrary to the rule of evidence, that a written instrument may not be varied, altered or contradicted by parol. *Bank v. Winslow*, 470.

10. *Same—Knowledge.*—The holder of a negotiable instrument by endorsement, with knowledge of the maker's equities against the payee as to the particular method of payment, and who has thus purchased the paper, takes subject to the equities existing between the original parties. *Ibid.*

11. *Same—"Set-Off."*—Where the holder of a negotiable instrument given by the maker containing the words "without off-set," takes with knowledge that it is to be paid out of the proceeds of sale of the maker's property in the hands of the payee, and thus subject to the equities of the maker, the words "without off-set" taken in their proper significance, does not relieve the holder of his obligation to recognize the equities of the maker as to the particular manner in which the instrument should be paid. *Ibid.*

BOARDS. See Indians, 1.

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CAPITAL FELONY. See Homicide, 3, 4, 10.

CARRIERS. See Government, 2; Judgments, 9.

1. *Carriers — Railroads — Freight Charges — Consignor and Consignee— Contracts.*—A railroad company, unless by special provision of the contract of carriage, either parol or written, expressed or implied in the course of mutual dealings, may recover its freight charges for the transportation of a shipment from the consignee thereof. *Davis v. Ford,* 444.

2. *Same—Burden of Proof—Evidence—Questions for Jury.*—The burden is on the consignor of a shipment by rail to show a special contract by which the company should look to the consignee for the payment of the freight charges thereon, and where relied on, it is a question for the jury to determine under the evidence. *Ibid.*

CASE. See Appeal and Error, 3, 16, 40, 41; Tenants in Common, 2.

CAUSE OF ACTION. See Actions, 1; Pleadings, 5.

CEMETERIES. See Municipal Corporations, 7, 8, 9.

CERTIFICATES. See Banks and Banking, 12.

CERTIORARI. See Appeal and Error, 16, 24; Courts, 6; Habeas Corpus, 2.

CHANGE. See Negligence, 22, 23; Judgments, 18.

CHARACTER. See Evidence, 10, 25; Criminal Law, 13, 22.

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CLAIMS. See Statutes, 1; Principal and Agent, 1; States, 1.

CLAIM AND DELIVERY. See Judgments, 11; Receivers, 1.

1. *Claim and Delivery — Judgments — Damages — Motion to Reinstate— Pleadings.*—While the successful plaintiff in claim and delivery is entitled to recover the property when it can be returned, together with damages for its depreciation, C. S., 836, after a judgment for the delivery of the property alone, a motion to reinstate the action for the purpose of inquiry as to damages for its depreciation cannot be allowed when the pleadings and evidence sustain the issues submitted upon which the judgment has been rendered, the judgment in that case being final and not interlocutory. *Polson v. Strickland,* 299.

CLASS LEGISLATION. See Constitutional Law, 10.

CLERKS OF COURT. See Courts, 1; Sales, 1; Evidence, 22; Deeds and Conveyances, 20.

1. *Clerks of Court—Judgments—Default—Jurisdiction—Statutes.*—Where the complaint declares upon a contract and alleges damages for its breach in a sum certain, and sets up matters that would constitute a statutory lien upon the subject-matter of the contract, the clerk of the court, under the provisions of our statute, has authority to render judgment by default for the want of an answer in the specific amount demanded, and to declare and enforce the lien, C. S., 595; 3 C. S., 593, and issue an execution thereunder, and order a distribution of the funds so received. Chapter 222, Public Laws 1925. *Held further,* the rights of lienors not parties to the action not being presented, the Court does not pass thereon. *Crye v. Stoltz,* 802.

2. *Same—Liens—Parties—Appeal and Error.*—Where a judgment by default final has been obtained against a corporation, providing for the enforcement of a statutory lien, a receiver therefor afterwards appointed cannot complain that the trustee in a deed of trust for the benefit of creditors had not been made defendant on his motion to set aside the judgment for excusable neglect, when by the terms of the instrument such liens were not disturbed or affected. *Ibid.*

CODICILS. See Wills, 1.

COLLATERAL SECURITY. See Evidence, 30.

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135, 358. Proper joinder of administrator, heirs at law, etc., in an action charging falsifying administrator's account. *S. v. McCanless*, 200.

160. Guard unlawfully killing escaping prisoner convicted of misdemeanor is liable in civil action. *Holloway v. Moser*, 185.

160. Condition annexed to bring action for wrongful death within a year. *Hanie v. Penland*, 800.

185. Requisites for inheritance by adopted child. *Sorrell v. Sorrell*, 439.

219(a), 3 C. S. Right of creditors to action against those whose names appear on books of corporations as shareholders. *Trust Co. v. Jenkins*, 761.

219(d), 3 C. S. Duty of seller of shares of corporation to have shares in corporation transferred on its books. *Trust Co. v. Jenkins*, 761.

237, 239, 240; 219(a), 3 C. S. Where officials have failed in their duty to bank, their liability must first be ascertained before requiring shareholders to pay balance on their subscription in action by receiver. *Corporation Commission v. Bank*, 113.

267, 270, 273, 3 C. S. Liability of surety on bond in bastardy. *S. v. Carnegie*, 467.

426, 3315, 7579. Plaintiff claiming title by adverse possession not required to show grant from State. *Pennell v. Brookshire*, 73.

437(4), 441(9). Action brought in three years to have deed absolute on its face to be declared to be a mortgage on ground of fraud. *Muse v. Hathaway*, 227.

446, 511, 547. Where amendment allowed to join husband in action on joint note with wife is in effect a new action. Limitation of Actions. *Fishell v. Evans*, 660.

446, 3017, 3018, 3032. Where bank is holder of negotiable instrument only for collection real holder must bring action. *Bank v. Rochamora*, 1.

456, 507, 535. Demurrer to complaint for misjoinder of parties is bad when two causes alleged against principal and surety on bond, when one cause alleged is good against both. *Killian v. Hanna*, 17.

465. Action to recover for services rendered deceased removable to county that issues letters testamentary. *Montford v. Simmons*, 323.

471, 472. Removal of cause for local prejudice to another county in trial court's discretion and not reviewable on appeal. *Gilliken v. Norcum*, 352.

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511(5). Demurrer to pleadings a speaking demurrer as to allegations not contained in pleadings. *S. v. McCanless*, 200.

516, 537. When pleadings may be ordered to be amended or divided by the judge. *S. v. McCanless*, 200.

516. Does not apply when complaint shows misjoinder of parties and causes of action. *Bank v. Angelo*, 576.

535. When demurrer to evidence will not be sustained. *S. v. Bank*, 524.

544. Rule requiring pleadings be made a part of record is mandatory. Dismissal of appeal. *Walden v. Cheek*, 744.

547, 1414. Courts may allow amendments to pleadings after nonsuit of one of several codefendants in severable controversy. *Spinks v. Ferebee*, 274.

564. Instruction of trial judge upon question of election of holder to sue one secondarily liable on negotiable instrument. *Darden v. Baker*, 386.

564. Where charge in murder case is substantially correct, for error prisoner must show he offered special request as to details, which was refused. *S. v. Johnson*, 701.

564. Applies to expressions of judge in jury's hearing. *S. v. Sullivan*, 754.

564. Under facts of this appeal, expression of judge in his instructions not held for reversible error. *S. v. Mitchell*, 796.

567. Evidence of railroad company's negligence in injuring one crossing railroad track in automobile on defendant's motion as of nonsuit. *Barber v. R. R.*, 691.

595, 593, 3 C. S. Clerk of court may enter judgment by default and declare lien. Parties. *Crye v. Stoltz*, 802.

600. Laches of nonresident attorneys attributable to nonresident defendant on motion to set aside judgment. *Pailin v. Cedar Works*, 256.

600. Meritorious defense must be shown by party seeking to have judgment set aside. *Crye v. Stoltz*, 802.

614, 672. Sheriff's deed to lands sold under execution conveys no title after day of return to court. *Jeffreys v. Hocutt*, 332.

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626. Division of lands wherein wife has an interest must be adjudicated as not injurious to her. *Valentine v. Granite Corp.*, 578.

642, 643, 644. After settlement by judge appellant should redraft case on appeal. *Waller v. Dudley*, 749.

643. Requirements for exception to charge. *Rawls v. Lupton*, 428.

731. Evidence as to whether a homestead laid off was a part of *locus in quo* in action of debtor of the deceased's estate. *Carstarphen v. Carstarphen*, 541.

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819. Summons in attachment for purpose of jurisdiction may run beyond county limits. Nonresidence. Venue. *Mohn v. Cressey*, 568.

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1185. Default in payment of interest on railroad coupon bond matures the series. Deeds of trust. Conditions precedent to foreclosure. *Jones v. R. R.*, 590.

1208. Constructive possession of contractor to cut lumber on owner's premises. *Ellington v. Currie*, 610.

1288. Admission of evidence cured by defendant's admission in action of damages for false arrest. *Harris v. Singletary*, 583.

1482. Letter on file in justice's court not competent as evidence. Partially a court of record. *Harris v. Singletary*, 583.

1500 (Rule 17). Justice of peace may continue case in attachment until publication completed for purpose of jurisdiction in attachment. *Mohn v. Cressey*, 568.

1667. Not necessarily required that judge find facts upon which he bases his order allowing alimony to wife. *Springer v. Springer*, 35.

1667, 3 C. S. Subsistence and attorneys' fees allowed wife in her action *a mensa*. *Vincent v. Vincent*, 492.

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2305, 2306. Penalty to recover for usury charge is in nature of debt. Parties. *Ripple v. Mortgage Corp.*, 422.

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2515. While this section applies to wife's deed to husband, the latter may set up valid title under a different deed. *Ellis v. Ellis*, 216.

2515. Statutes in derogation of common-law right are strictly construed. When not followed, husband has only right of curtesy. Deeds and Conveyances. *Caldwell v. Blount*, 560.

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2623. City held in this case to have authority to purchase lands for a public use. Injunction. *Harrison v. New Bern*, 555.

2678. City may not collect back taxes omitted from tax list through its mistake without authority of statute. *Whitley v. Washington*, 240.

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3033. Section applies to innocent holder of negotiable instrument in due course. *Wadford v. Gillette*, 413.

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3305. Passing on probate a judicial act of clerk. Clerk interested a nullity. *Norman v. Ausbon*, 791.

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3560. Does not extend to index books subdividing alphabetical arrangement of letter. Priority of liens. *Clement v. Harrison*, 825.

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4200, 4642. Verdict must specify first degree murder to sustain death sentence. *S. v. Bazemore*, 336.

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IV, sec. 8. Supreme Court is confined on appeal to matters of law and legal inference, and may not otherwise disturb verdict. *Robinson v. Ivey*, 805.

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V, sec. 3. This applies to taxation by cities and towns. *Bond v. Tarboro*, 248.

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VII, sec. 9. Municipality failing through its mistake to list taxes may not collect them as back taxes in absence of statute. *Whitley v. Washington*, 240.

VII, sec. 12; VIII, sec. 1. Vested rights of owners of land in Mattamuskeet Drainage District cannot be impaired by statute. *O'Neal v. Mann*, 153.

XI, sec. 1. C. S., 7723, 7728, are constitutional under this article and section. *S. v. Revis*, 192.

XII, sec. 1. Veteran's Loan Statute not class legislation. *Hinton v. State Treasurer*, 496.

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1. *Constitutional Law—Statutes—Employment Agencies—Initial Fees—Injunction.*—The question of the constitutionality of a statute prohibiting employment agencies to charge an initial fee for its services, does not arise upon the citation by the Commissioner of Labor and Printing to the agency to appear and show cause in court why the agency's license should not be revoked for the violation of the statute in this respect, it presently not appearing whether the agency had charged such fee or the adverse action of the commissioner upon the question involved. *Barton v. Grist*, 144.

2. *Same—Courts—Advisory Opinions.*—The courts will not anticipate questions of constitutional law in advance of the necessity of deciding them, or give advisory opinions thereon. *Ibid.*

3. *Constitutional Law—Convicts—Corporal Punishment—Statutes.*—Where a public-local law provides for whipping to be administered to convicts sentenced to work upon the roads as an extreme necessary means to enforce discipline, safeguarded in respect to its being humanely administered after due notice to the offender, under proper rules and regulations, with report to the commissioners of the county

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to which the local law applies, making it a misdemeanor for the one designated to do so brutally or without mercy: *Held*, the statute is not inhibited by any provision of our Constitution, and is a valid enactment. C. S., 7723, 7728; Constitution, Art. XI, sec. 1. *S. v. Revis*, 192.

4. *Constitutional Law—Exemptions—"Homes"—Mortgages.*—Art. V, sec. 3, of the State Constitution relieving from taxation a mortgage on a home given in good faith, to build, repair or purchase a home when the loan so secured does not exceed eight thousand dollars, applies to taxation by cities and towns. *Bond v. Tarboro*, 248.

5. *Same—Injunction.*—The imposition of an unconstitutional tax upon money borrowed to repair or build a "home," may be contested either by first paying the tax under protest and action to recover it, or by injunction otherwise against its collection. C. S., 858, 7979. *Ibid.*

6. *Constitutional Law — Criminal Law — Punishment—Discrimination.*—Under provisions of C. S., 3410, applying to all counties of the State, a violation of the prohibition law, upon conviction, is punishable in all counties of the State by fine or imprisonment, within the discretion of the trial judge, and a statute, applying only to five counties, making the punishment a fine only in certain instances, is in violation of our Constitution, and void. Const., Art. I, sec. 7. *S. v. Fowler*, 290.

7. *Same—Indictment—Judgment.*—Where the indictment for the violation of our prohibition law is drawn under the provisions of C. S., 3410, and there is an existing statute applying to a county wherein the trial is had making the defendant in case of the first offense punishable only by a fine, and imprisonment for the second offense, and is void in the former instance, as to which the indictment would otherwise be defective, a sentence under the general statute is properly entered, upon conviction. *Ibid.*

8. *Constitutional Law—Statutes—Courts.*—The courts will not declare a statute unconstitutional where its validity may be sustained by a reasonable construction, or its invalidity by such interpretation thereby unmistakably appears. *Hinton v. State Treasurer*, 496.

9. *Constitutional Law—Taxation—Bonds—War—Faith and Credit—Loans to Veterans—Public Purpose.*—A statute for the purpose of issuing bonds, passed by the Legislature in accordance with the constitutional provision as to the "aye" and "no" vote, and its passage upon the separate days by each branch of legislation, and which has been approved by the vote of the people of the State at an election duly had for the purpose, Const., Art. V, sec. 4, providing for an issuance and sale of State bonds for the purpose of lending the proceeds on mortgage to a certain amount of the value of the land to the veterans of the World War to help them in providing homes for themselves, is the pledging of the credit of the State for a public purpose, and is a valid exercise of statutory authority. Const., Art. V, sec. 7. *Ibid.*

10. *Same—Class Legislation—Uniformity of Taxation.*—It is not unconstitutional as class legislation for a statute providing for the sale of State bonds for the purpose of aiding veterans of the World War in acquiring homes by loaning them money under mortgage, for the act to exclude those who had not engaged in active military service or who

CONSTITUTIONAL LAW—*Continued.*

had been dishonorably discharged, or who had secured positions under the Government during the war that had not exposed or tended to expose them to danger in the fighting territory. Const. of N. C., Art. I, sec. 26; Art. XII, sec. 1. *Ibid.*

11. *Same—Curative Statutes—"Aye" and "No" Vote—Separate Days.*—Where a statute, pledging the faith and credit of the State in issuing State bonds, has not been passed in accordance with the provisions of our State Constitution, Art. I, sec. 14, and are therefore invalid, its invalidity may be cured by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bonds thereunder issued after the question has been submitted to and approved by the voters of the State, as the statute required, are valid. *Ibid.*

12. *Same—Government—Federal Government.*—Under our system of government, a declaration of war by Congress and the drafting of soldiers, is an act on the part of each State in the Union, and is for the interest of all, and does not affect the validity of a State bond issue providing money to aid the citizens of the State who had performed active military service in the war so declared, which is otherwise valid under the Constitution of the State enacting the statute. *Ibid.*

13. *Constitutional Law—Trial by Jury—Statutes—Legislative Powers.*—The policy for the preservation of the right to a trial by jury provided for by Art. I, sec. 19, of the State Constitution, respecting property rights, is ordinarily for the Legislature to declare. *Board of Education v. Forrest*, 519.

14. *Constitutional Law—Courts—Statutes—Repeal.*—Where the Legislature, in contravention of Art. II, sec. 29, of the Constitution of this State, has established a court inferior to the Superior Court, an incumbent judge thereof, duly elected, may not successfully contend that he was deprived of the emoluments of his office by an unconstitutional statute abolishing the court. *Queen v. Comrs. of Haywood*, 821.

15. *Same—Property—Vested Rights.*—Where the Legislature has abolished a court inferior to the Superior Courts of this State, the incumbent judge takes subject to this legislative right, and cannot successfully maintain that during the term of his office he has been thus deprived of his right of property guaranteed him by Art. IV, sec. 30, of our Constitution. *Ibid.*

CONSTRUCTIVE POSSESSION. See Receivers, 2.

CONTINGENT INTERESTS. See Wills, 19.

CONTINGENT REMAINDERS. See Estates, 5, 6; Wills, 18, 19.

CONTINGENT AND SPRINGING USES. See Wills, 6.

CONTINUANCE. See Injunctions, 1; Courts, 9.

1. *Continuance—Criminal Law—Courts—Discretion—Constitutional Law.* While ordinarily the continuance of the case to allow alleged offenders against the criminal law opportunity to prepare their defense, is a matter addressed to the sound discretion of the trial judge, the exer-

CONTINUANCE—*Continued.*

cise of this discretion must not violate the provisions of Art. I, sec. 17, of our Constitution, stating that no person shall be deprived of his life or liberty, etc., but by the law of the land. *S. v. Ross*, 25.

CONTRACTS. See Arbitration and Award, 2, 3; Bailment, 1, 6; Bills and Notes, 6, 9; Counties, 1; Highways, 8, 10; Insurance, 1, 5, 8, 9, 10, 12, 19; Judgments, 4, 16, 20; Principal and Surety, 1; Deeds and Conveyances, 8; Carriers, 1; Mechanics' Liens, 1; Usury, 2; Mortgages, 5; Attorney and Client, 1; Debtor and Creditor, 1; Corporations, 11, 12; Election of Remedies, 1; Negligence, 19; Receivers, 2, 3; Release, 1.

1. *Contract—Writing—Parol Evidence.*—Where a contract not required by law to be in writing rests partly in parol, it is competent to show that part of the agreement of the parties not reduced to writing, when it does not vary, alter, or contradict the written part. *Greene v. Bechtel*, 94.

2. *Contracts — Breach — Damages — Partnership—Principal and Agent.*—Where there is evidence that the plaintiff is a civil engineer in the business of laying out and constructing hydro-electric water plants for municipal corporations, and after the preliminary work has agreed with the defendant construction company that he would bid for the work upon an expense and profit-sharing basis, and the defendant has agreed to put in a bid for both, but has, unknown to the plaintiff at the time, secured the contract for itself: *Held*, the defendant is liable to the plaintiff in the amount the plaintiff would have received for his share of the profits had the defendant acted in good faith under the agreement they had entered into. *Spinks v. Ferebee, Mayor*, 274.

3. *Contracts—Estoppel—Wills—Devise.*—The deceased having taken lands by devise, subject to a charge of five hundred dollars in favor of M., and by purchase from B. a certain other tract of land, died leaving a will by which he bequeathed the heirs at law of M., now deceased intestate, certain sums of money in lieu of their shares in the said five hundred dollars, with further provision that should said heirs at law be paid moneys by him during his life, it would be in lieu of the amount they would receive under his will: *Held*, a receipt signed by such heirs at law, of full age, for sums of money so paid, was an estoppel by contract to declare a parol trust in favor of M., their ancestor. The modern doctrine of estoppel and election discussed by CLARKSON, J. *Winstead v. Farmer*, 405.

4. *Same—Receipts.*—Where the testator devises certain sums of money to be accepted by the heirs at law of M., deceased, in lieu of a charge made upon lands previously devised to him by the ancestor of M., with provision that moneys devised to said heirs by the testator were to be received by them in satisfaction of that given to them respectively, moneys so accepted by them in the testator's lifetime when the devisees were of age, and receipt given with reference to the will, will impute to them knowledge of the provisions of the will, and will operate against them as an estoppel by contract. *Ibid.*

5. *Contracts—Insane Persons—Adjudication of Insanity—Void Contracts.* Contracts made with one after she has been officially adjudged to be

CONTRACTS—*Continued.*

insane and lacking in mental capacity to execute them are void, and voidable only when made before such official determination. *Wadford v. Gillette*, 413.

6. *Same—Voidable Contracts—Restitution of Consideration—Status Quo—Equity.*—One dealing with a person, knowing her to be insane, or of insufficient mental capacity to make a contract, is deemed to have perpetrated a fraud upon her and her rights; but where the person thus dealing with her does so in good faith without notice of her mental incapacity, and pays a valuable consideration which cannot be restored or the parties cannot be put in *statu quo*, the contract so executed is valid and enforceable. *Ibid.*

7. *Same — Burden of Proof — Knowledge—Restitution—Consideration.*—Where the mental incapacity or insanity of the party to a contract sued on has been shown in evidence in an action thereon, the burden is on the party claiming thereunder to show, when relied on, that he was ignorant of the fact of such incapacity, and without notice of such facts as would put a reasonably prudent man upon inquiry; that the transaction was fair and no advantage was taken, and that restitution of the consideration or adequate compensation could not be made. *Ibid.*

8. *Contracts—Insane Persons—Mental Incapacity—Husband and Wife—Consideration—Equity—Estate by Entireties.*—Where the insanity or mental incapacity of a married woman is set up in a suit to declare a mortgage void executed by her and her husband on her separate lands, the fact that in the course of the transaction she had acquired an estate to lands in entireties with her husband, had lived thereon for years enjoying with him the profits thereof, and that her separate lands had been appreciably relieved of certain mortgage liens, is sufficient consideration to be considered by a court of equity upon the doctrine of restitution in placing the parties in *statu quo*. *Ibid.*

9. *Contracts—Insane Persons—Bills and Notes—Negotiable Instruments—Due Course.*—The same principles that control contracts of insane persons apply to negotiable instruments in the hands of an innocent holder in due course for value. C. S., 3033. *Ibid.*

10. *Contracts — Statute of Frauds — Sufficient Writings — Principal and Agent.*—A series of written letters, telegrams or other papers, documents, etc., signed by the parties or their authorized agents relating to the subject-matter of the transaction, will be construed together, and when the contract appears to be complete, the omissions in some of the writings supplied by others, it is sufficient in contemplation of the statute of frauds to be binding upon the parties thereto. *Simpson v. Lumber Co.*, 454.

11. *Contracts—Indemnity Bonds—Courts—Intent—Interpretation—Expression of the Parties.*—The interpretation of a bond of indemnity reciting the purpose for which it was taken will ordinarily be given controlling significance by the Court in construing the intent of the parties thereto. *S. v. Bank*, 524.

12. *Contracts—Principal and Surety—Buildings—Materialmen—Fraud in the Treaty.*—Where the contractor for a building to be erected pro-

CONTRACTS—*Continued.*

vides for his payment of material used in and labor performed on the building and furnishes an indemnity bond expressly providing for the payment of such materials and labor, a materialman whose claim has remained unpaid may directly sue the surety and recover upon the bond on its promise to pay. *Glass Co. v. Fidelity Co.*, 769.

13. *Same—Evidence.*—Where the contract for the erection of a building provides for the payment of money, and the contractor and owner have secretly agreed that the contractor should receive as a part of his consideration certain mortgage bonds on the building contemplated, it is fraud in the treaty of the rights of the surety on the contractor's bond who has executed it without knowledge of the fact, and the materialmen whose claims are thereunder provided for, take subject to all legal defenses and inherent qualities arising out of the contract sued on. *Ibid.*

14. *Same—Election of Remedies—Fraud in the Factum.*—Where the fraud perpetrated in the execution of a contract is in the treaty as distinguished from being in the *factum*, upon discovering the fraud the injured party may affirm the contract and sue to recover his damages by reason of the fraud, or he may elect to rescind the contract and recover at common law or in equity; or he may seek affirmative relief in a suit in equity. *Ibid.*

15. *Same—Nonsuit—Waiver—Pleadings.*—Where the materialman sues the owner of a building to be erected, together with the contractor and the surety on his bond, and a trustee who held funds for the benefit of the parties, an agreement of nonsuit entered of record, without prejudice to plaintiff's rights against the surety will not, as a matter of law, be construed as a waiver of the right of the plaintiff to recover of the defendant surety upon issues raised by the pleadings between them. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Railroads, 1; Issues, 1; Negligence, 12, 18, 24; Master and Servant, 5.

CONTROVERSY WITHOUT ACTION. See Actions, 6.

CONVERSION. See Wills, 16.

CONVEYANCES. See Mortgages, 1.

CONVICTS. See Constitutional Law, 3; Escape, 1; Statutes, 3.

1. *Convicts—Felons—Misdemeanants—Clothing—Escape.*—One of the intentions of the Legislature in enacting C. S., 7730, 7731, requiring a distinct difference in dress between those convicted of a felony and misdemeanants, was to apprise the guard over them of this difference, and where the guard has unlawfully killed one in the latter class while endeavoring to escape, he may not avoid the consequences of his act upon the ground that he could not tell for which offense the prisoner had been sentenced. *Holloway v. Moser*, 185.

COPIES. See Evidence, 19, 21.

CORAM NON JUDICE. See Courts, 5.

CORPORATIONS. See Drainage Districts, 4, 6; Banks and Banking, 8.

1. *Corporations—Minutes of Meeting—Directors—Estoppel.*—Where a director of a corporation has attended a meeting at which by resolution he has written himself, properly passed, his monthly salary has been fixed in a certain sum for the period of a year, and he has continued his employment thereunder without objection, he is by his acquiescence estopped to deny that the salary so fixed for the period stated in the ordinance was for a period of five years, and after several years maintain his action to recover the difference for that period and the smaller sum he has continued thereafter to draw. *Wright v. Fertilizer Co.*, 305.

2. *Same—Mismanagement—"Surplus Fund."*—Where a director of a corporation has acquiesced in a resolution drawn by himself, properly passed and recorded, providing for the issuance of preferred stock to cover a loss alleged to have been sustained by mismanagement of the former officers or directors of the corporation, he is estopped to recover his proportionate part of the alleged loss. *Ibid.*

3. *Same—Parol Evidence.*—The principle that the written minutes of the meetings of a board of directors of a corporation may be corrected by parol evidence to speak the truth, does not apply when a member of the board is estopped by his acts and conduct in giving assent to the resolution in question. *Ibid.*

4. *Corporations—Deeds and Conveyances—Officers—Self-Interest—Directors—Resolutions—Meetings.*—Where the president and secretary of a corporation control a majority of its stock, and with three others constitute the board of directors, a deed executed in proper corporate form by them to the secretary, for an adequate consideration, in good faith and in the absence of fraud, under a full discretionary power given to the president by the directors by resolution properly passed, is not absolutely void under the principle that an officer of a corporation may not deal with it in his official capacity for his own gain or profit. *Mfg. Co. v. Bell*, 367.

5. *Same—Ratification.*—And where authority for such transaction has not been given by the corporation, it is only voidable at the election of the company, and may be afterwards ratified by proper corporate action. *Ibid.*

6. *Corporations — Directors — Records — Resolutions—Parol Evidence.*—Where authorization for the sale and conveyance of corporate lands has not been fully recorded in the record of its stockholders meeting, the omitted parts may be shown by parol evidence. *Ibid.*

7. *Corporations—Deeds and Conveyances—Officers — Self-Interest—Good Faith—Fraud—Burden of Proof—Evidence—Questions for Jury.*—The presumption is against the validity of a deed to corporate lands made by the president of a corporation to its secretary, with the burden on the grantee to show that the purchase was fair, open and free from imposition, undue advantage or actual or constructive fraud, the question being for the jury to determine. *Ibid.*

8. *Same—"Good Faith"—Evidence.*—Evidence that the directors of a corporation were individually consulted as to the conveyance of the

CORPORATIONS—*Continued.*

corporate lands by the president and secretary to the latter, is *held* competent, under the facts of this case, only upon the question of "good faith" in the transaction. *Ibid.*

9. *Corporations—Issuance of Shares of Stock for an Existing Business—Shareholders—Individual Liability.*—In the absence of fraud, the determination of the board of directors as to the value of the business of a partnership to the partners of which shares of stock had been issued therefor, is conclusive, in an action to enforce individual liability against the partners upon the ground that the assets were of insufficient value to purchase the shares of stock. *Tire Co. v. Kirkman*, 534.

10. *Same—Burden of Proof.*—The burden of proof is upon the partners to show that the partnership business given for the shares of stock issued by a corporation formed to take it over, was a sufficient consideration for the transaction. *Ibid.*

11. *Corporations — Bonds—Mortgages—Trusts—Deeds and Conveyances—Foreclosure—Sales—Contracts—Stipulations.*—Where a railroad corporation conveys its property, and income in trust for the purpose of securing the payment of coupon bonds to be issued and generally sold for the equal protection of all purchasers, a provision in the deed of trust to the effect that upon default in the payment of the interest, etc., the trustee shall have the power to foreclose upon request of the holders of a certain part of the par value of the bonds, is for the benefit of all such holders, and those who held such proportionate part are bound by the valid provision of their contract, and without complying therewith a permanent receiver may not be appointed by the court under the provisions of C. S., 1185, in their direct suit for the purpose, though the corporation itself may be insolvent. *Jones v. R. R.*, 590.

12. *Corporations—Officers—Scope of Employment—Quantum Meruit—Contracts.*—An officer of a corporation cannot recover thereof for services rendered by him in the course and scope of his duties in the absence of an express contract to that effect made prior to their rendition, but only under certain circumstances for the reasonable value of services rendered entirely outside of the line of his duties as such officer. *Credit Corp. v. Boushall*, 605.

13. *Same—Attorney and Client.*—Where an attorney, the officer of a trust company whose time was practically given to his duties thereto, has acted in his capacity as attorney for the formation of another financial corporation, and thereafter has in addition to his official duties of the trust company, accepted the position of president of the corporation so formed, he may not, in the absence of express contract therefor, receive additional compensation therefrom for services rendered as such president as implied upon a *quantum meruit*. *Ibid.*

CORPUS DELICTI. See Appeal and Error, 1; Homicide, 16.

COUNSEL. See Criminal Law, 22.

COUNSEL FEES. See Divorce, 1.

COUNTERCLAIM. See Pleadings, 5.

COUNTIES. See Education, 1; Judgments, 18; Officers, 1, 2.

1. *Counties — Highways — Contracts—County Commissioners—Corporate Action—Minutes.*—In an action against the county by a road contractor for additional compensation under an alleged agreement that the county commissioners would pay the contractor an additional amount to the contract price for a material change made in the location of a highway, it must be shown by the plaintiff that the commission acted in their official capacity at a lawful meeting held by them by resolution properly passed, though not necessarily recorded upon the minutes of their meeting. *London v. Comrs. of Yancey*, 100.

2. *Same—Evidence—Remand.*—*Held*, upon the record of this appeal there was no sufficient evidence that the county commissioners acted in their corporate capacity in contracting to pay an additional sum for the change made in the relocation of the county highway, and the case is remanded. *Ibid.*

COUNTY-SEAT. See Highways, 1.

COURTS. See Actions, 7; Pleadings, 7; Constitutional Law, 2, 8, 14; Continuance, 1; Criminal Law, 2, 17; Negligence, 12; Drainage Districts, 2, 3, 5; Judgments, 3, 4, 10, 20; Wills, 1, 16; Appeal and Error, 16, 40; Habeas Corpus, 3; Contracts, 11; Attachment, 3; Mortgages, 5; Deeds and Conveyances, 21.

1. *Courts — Equity — Superior Courts—Jurisdiction—Actions—Executors and Administrators—Final Accounts—Clerks of Courts—Demurrer.*—Under the equitable principles and the provisions of C. S., 135, confirmatory thereof, a suit may be maintained in the Superior Court to enforce a judgment against the personal representatives of the decedent after final account has been filed with the clerk of the court having jurisdiction of the administration of the estate to surcharge and falsify the final account filed therein, and a demurrer to the complaint sufficiently alleging the facts that fall within this principal on the ground that the clerk of the court had exclusive jurisdiction, is bad. *S. v. McCanless*, 200.

2. *Same—Parties.*—*Held*, under the facts of this case, where it is alleged that the administrators, the widow of the deceased, his heirs at law, received of the falsified final account filed with and accepted by the clerk, a benefit, by reason of which the plaintiff's judgment against the administrator remained unpaid, the joinder of the administrators personally and individually, the sureties on the administration bond, and the widow and heirs at law, was proper, and a demurrer on that ground was bad. C. S., 358, 135. *Ibid.*

3. *Courts—Judicial Notice—Health—Police Powers—Perishable Merchandise.*—The courts will take judicial notice that the sale of meats, fish, vegetables, etc., within the limits of a populous city affects the health of its citizens and falls within its police powers. *Angelo v. Winston-Salem*, 207.

4. *Same—Constitutional Law.*—Where, in conformity with a valid city ordinance, dealers in meats, fish, oysters, etc., have made sanitary provision for their sale, expending moneys, etc., for the purpose, a later ordinance which excludes their location from one prescribed

COURTS—*Continued.*

does not deprive such dealer of the property rights under our Constitution, where ample means and facilities are properly provided to take care of all who may apply, and at a reasonable rental. *Ibid.*

5. *Courts—Recorder's Courts—County Commissioners—Appointment of Substitute Recorder—Coram Non Judice.*—Where a substitute recorder of the county court is elected by the county commissioners under statutory authority providing that it may be so done when the recorder is absent from the county or unable to perform the duties of the court, the former may hear and determine a criminal case coming within the jurisdiction of the court when the latter refuses to act upon the ground that he is related by blood to the prosecuting witness, and objection that the prosecution was *coram non judice* is untenable, and a writ of *certiorari* in *habeas corpus* proceedings will be denied in the Supreme Court, when the motion is based on this ground alone. *S. v. Hartley*, 304.

6. *Courts—Supreme Court—Certiorari—Discretion—Appeal and Error—Rules of Court—Practice.*—The granting or refusal of a motion for a *certiorari* to bring up a case to the Supreme Court for review, when not contravening the fixed and uniformly applied rules of the Court, is within the discretion of that Court. *Waller v. Dudley*, 354.

7. *Courts—Railroads—War—Federal Courts.*—The decision of the Supreme Court of the United States is controlling over that of the State court upon the issuance of levy and execution against the property of a railroad, under a judgment rendered as to the time the railroad was in control of the Government as a war measure. *R. R. v. Story*, 362.

8. *Courts—Jurisdiction—Justices of the Peace—Nonresident Defendants—Attachment—Garnishments—Process—Statutes.*—The issuance of a warrant of attachment by a justice of the peace having jurisdiction of the action is only for the purpose of acquiring jurisdiction over a defendant who is a nonresident of the State, and is only incidental to the relief sought in the original action, C. S., 819, and the warrant in garnishment may run beyond the limits of the county wherein the action was brought. *Mohn v. Cressey*, 568.

9. *Same — Publication of Summons—Continuance—Interpleader.*—Where funds of a nonresident defendant have been attached in an action brought before a justice of the peace in a different county, the justice may continue the case until service of summons by publication has been made on the nonresident defendant, and a motion to dismiss made by an intervener claiming the funds for want of jurisdiction of the justice under these circumstances, will be denied, C. S., 1500. Rule 17. The provisions of C. S., 1489 do not apply. *Ibid.*

CREDIBILITY. See Evidence, 12; Instructions, 14.

CRIMINAL LAW. See Appeal and Error, 1; Rewards, 1; Constitutional Law, 6; Continuance, 1; Evidence, 10, 25; Arrest and Bail, 3, 4; Instructions, 11.

1. *Criminal Law—Motions — Abatement—Pleas—Appeal and Error—Affidavits—Presumptions.*—Where the defendants in a criminal action before trial move to quash the indictment in the bill upon affidavits not appearing on appeal to have been denied, and accepted in the

CRIMINAL LAW—*Continued.*

Supreme Court by the Attorney-General to be true, the appeal thereon will be determined upon the allegations of the affidavit as a correct statement of the truth as therein alleged. *S. v. Crowder*, 130.

2. *Same—Grand Jury—Solicitors—Courts—Appeal and Error.*—The grand jury, in passing upon a criminal indictment act independently of the solicitor, and receive such instructions as they may desire from the judge presiding, and when it is made to appear that the solicitor was present in the grand jury room assisting the grand jury by explaining the evidence and the law, the defendant's plea in abatement should be granted upon a sufficient affidavit of the defendant upon motion made before the trial. *Ibid.*

3. *Criminal Law—Statutes—Misdemeanors—Common Law—Declaratory Statutes.*—The offense of breaking prison after being lawfully confined, C. S., 4404, making it a misdemeanor, is in case of imprisonment for a misdemeanor, and is declaratory of the common law. *Holloway v. Moser*, 185.

4. *Criminal Law—Embezzlement—Evidence—Principal and Agent—Questions for Jury.*—Evidence on a trial for embezzlement under a proper indictment, that the defendant obtained money on a check of the prosecuting witness given him to buy a certain business for the witness and converted it to his own use, is sufficient to take the case to the jury. *S. v. Maragousis*, 246.

5. *Criminal Law—Unrelated Offense—Evidence—Appeal and Error.*—Where the defendant is tried for embezzlement, evidence that in an unrelated instance the defendant was guilty of a similar offense is improperly admitted and constitutes prejudicial error. *Ibid.*

6. *Criminal Law—Burning—Dwelling—Statutes—Evidence—Questions for Jury.*—Threats of the tenant in and former owner of the house that she would destroy the house she lived in before the owner by purchase at a foreclosure sale should get the possession he demanded, with the other evidence in this case tending to show the guilt of the defendant, is *held* sufficient to convict her of its burning under the provisions of C. S., 4245. *S. v. Anderson*, 253.

7. *Criminal Law—Libel—Warrant—Indictment.*—*Held*, objection that warrant in this case was not sufficient to charge a criminal offense untenable. *S. v. Hartley*, 304.

8. *Criminal Law—Evidence—Fornication and Adultery—Prostitution—Husband and Wife—New Trials.*—On a trial of the defendants for the criminal offense of prostitution, assignation, and fornication and adultery, mere neighborhood rumors are incompetent; and the wife may not testify to the acts and conduct of her husband, the codefendant, that tend to convict him of the crime charged. *S. v. Aswell*, 399.

9. *Criminal Law—Evidence—Identity—Questions for Jury—Nonsuit.*—Evidence of identity of the defendants as the ones who committed an assault upon the prosecutor with a deadly weapon, C. S., 4213, inflicting injury, is sufficient, which tends to show that the defendants visited him, the prosecutor, at his home, used abusive and threatening language, were traced and found together by the officers of the

CRIMINAL LAW—*Continued.*

law soon after the assault, one of them made false statements as to the direction from which they had come; the shotgun they had was warm from firing, and the shells found there were identical with shells which had been fired and were found at the place of the injury, etc., is sufficient to take the case to the jury, upon defendants' motion as of nonsuit thereon. *S. v. Gibson*, 487.

10. *Criminal Law—Evidence—Malice.*—Where malice is an ingredient of a criminal offense charged in the indictment, previous threats are admissible thereof, though not admissible as substantive evidence. *Ibid.*

11. *Criminal Law—Instructions—Excerpts from Charge—Appeal and Error.* While the State is bound to show beyond a reasonable doubt every material element of the offense charged, an instruction to the jury will not be held for error if contextually construed as a whole, but not disjointedly as to excerpts from its various parts, the rule of law has been followed by the Court. *S. v. Walker*, 489.

12. *Criminal Law—Intoxicating Liquor—Aiding and Abetting—Evidence—Questions for Jury.*—Where there is evidence tending to show that the defendant was not only present at the commission of the offense of unlawfully transporting intoxicating liquor, but actively participated therein, an issue of fact is raised for the determination of the jury. *S. v. Baldwin*, 566.

13. *Criminal Law—Evidence—Character—Impeaching Evidence.*—Where a defendant has not testified in his own behalf, his general character has not been put in issue, and it is reversible error for his wife to testify against it as to particular instances. *S. v. Adams*, 581.

14. *Criminal Law—Evidence—Impeaching Evidence—Husband and Wife.*—Upon the trial of an assault with attempt to commit rape, testimony of the defendant's wife in effect that he had theretofore been several times arrested for a criminal offense, is erroneously admitted as tending to impeach his character in a criminal action. *Ibid.*

15. *Criminal Law—False Arrest—Evidence—Malice—Admissions—Statutes—Appeal and Error.*—Where the justice of the peace has testified on the trial to recover damages for false arrest that he considered the criminal action "frivolous and malicious," and had taxed the defendant (prosecutor) with cost, the erroneous admission of this evidence is cured by the defendant's admission that he had paid the cost thus taxed against him. C. S., 1288. *Harris v. Singletary*, 583.

16. *Criminal Law—Appeal and Error.*—The defendant in a criminal action may appeal from a justice's court to the Superior Court from an adverse judgment, taxing him with cost. *Ibid.*

17. *Criminal Law—Admissions—Prostitution—Courts—Findings of Fact—Judgment—Statutes.*—Where the general plea of guilty is made by the defendant charged with the offense of prostitution, and accepted by the court, the submission is sufficiently broad to cover the two degrees set out in the statute, C. S., 4361, 4362. *S. v. Brinkley*, 747.

18. *Same—Limitation of Actions.*—Where the defendant upon trial for prostitution submits the plea of guilty without reservation, which is accepted by the court, he may not maintain the position that the

CRIMINAL LAW—*Continued.*

punishment for the offense was barred by the statute of limitation of actions, as the time and place of its commission are not necessary to constitute the offense. *Ibid.*

19. *Same—Pleas.*—For a person charged with the commission of a criminal offense to avail himself of the alleged running of the statute of limitations, he must either specifically plead it or in apt time bring it to the attention of the court. *Ibid.*

20. *Same—Indictment.*—A defendant sentenced for the crime of prostitution upon his own admission of guilt, may not successfully resist a sentence therefor upon the ground that the offense charged in the indictment did not come within the period of time prescribed by the statute. *Ibid.*

21. *Criminal Law—Evidence—Verdict—Judgments.*—Where the indictment charges two criminal offenses and there is evidence only as to one, a judgment on a verdict of guilty will be sustained. *S. v. Ridings*, 786.

22. *Criminal Law—Character—Evidence—Remarks of Council—Appeal and Error—Instructions—New Trials.*—Where the character of the defendant is not put in issue, and no evidence on the point is introduced, his character necessarily stands indifferent. *Ibid.*

CROSS-EXAMINATION. See Evidence, 11, 24, 27.

CROSSINGS. See Negligence, 11, 24, 25.

CURATIVE STATUTES. See Constitutional Law, 11.

CURTESY. See Deeds and Conveyances, 15.

CUTTING TIMBER. See Mortgages, 8.

DAMAGES. See Actions, 2; Claim and Delivery, 1; Contracts, 2; Eminent Domain, 1, 2, 3; Municipal Corporations, 1, 3, 5, 6; Railroads, 1; Negligence, 8; Mortgages, 6; Bailment, 4.

1. *Damages—Negligence—Instructions—Minority—Parent and Child—Appeal and Error.*—An instruction as to the amount of compensatory damages, past, present and prospective, the plaintiff is entitled to recover, caused by the defendant's negligence, is erroneous that does not take into consideration the minority of the plaintiff, suing by her next friend, without evidence of the parent's emancipation of the child. *Gillis v. Transit Corporation*, 346.

2. *Damages — Speculative Damages — Accounting—References.*—Where a register of deeds has defaulted in paying over to the county moneys he has received as such officer, and the amount is capable of ascertainment by a reference and accounting, the recovery of this amount in an action against the register of deeds and his sureties is not speculative or remote. *S. v. Adams*, 729.

3. *Damages—Negligence—Permanent Injury—Evidence—Mortuary Tables—Expectancy of Life—Net Amount—Appeal and Error.*—The amount of plaintiff's recovery from a negligent personal injury inflicted on him by the defendant should be confined upon supporting evidence to the present net worth of the sum of money to be ascertained by the

DAMAGES—*Continued.*

jury for the time fixed by the mortuary table enacted into our statute, considered with the evidence as to the health of the plaintiff at the time, the mortuary tables to be considered by the jury as only evidentiary in connection with other relevant evidence, and an instruction otherwise upon these two elements of damages for their consideration is reversible error. *Taylor v. Construction Co.*, 775.

DEADLY WEAPON. See Homicide, 11.

DEATH. See Insurance, 16.

DEBT. See Mortgages, 3.

DEBTOR AND CREDITOR. See States, 1; Banks and Banking, 4, 8.

1. *Debtor and Creditor—Contracts—Guarantor of Payment—Assignment.*—Where the parties contract to pay a particular or specified debt of another, it is a guaranty of payment, and assignable by the one to whom it has been made. *S. v. Bank*, 524.

2. *Same—Banks and Banking—State Deposit—Principal and Surety—Indemnity Bonds—Statutes.*—Where the State Highway Commission has received money from a county to build a certain road therein, and has required from a local bank in which the deposit had been made a bond indemnifying it against loss, and after abandoning the project has transferred the fund to the county assigning to the latter the security of the bond: *Held*, the sureties on the bond are liable to the county for the loss of the funds upon the failure of the bank of deposit, or of its successor bank, after its reorganization, that had assumed its liabilities. *Ibid.*

DECEASED PERSONS. See Wills, 11.

DECLARATIONS. See Evidence, 13.

1. *Dedication — Acceptance — Municipal Corporations — Withdrawal of Dedication—Statutes—Parks.*—The prospective dedication of streets, parks, etc., in the sale of a development of lands is not binding upon a city until acceptance, and neither the city nor the general public can acquire any rights thereunder against the owner of the land or purchasers from him where the offer of dedication has been withdrawn before acceptance, under the provisions of 3 C. S., 3846(rr). *Irwin v. Charlotte*, 109.

DEEDS AND CONVEYANCES. See Drainage Districts, 1; Records, 1; Evidence, 5; Execution, 1; Judgments, 6, 13, 14; Limitation of Actions, 1; Mortgages, 1, 3, 8; Reformation of Instruments, 2; Sales, 1; Wills, 3, 16; Estates, 4; Husband and Wife, 2; Corporations, 4, 7, 11; Municipal Corporations, 7; Tenants in Common, 1; Appeal and Error, 31.

1. *Deeds and Conveyances—Land Development—Maps—Streets—Parks—Equity—Estoppel—Judgments.*—The purchaser of land in a development of the owners, with registered plat showing the lands to be divided into blocks with streets, parks, etc., have the equitable right to the use of such streets, parks, etc., and such purchasers may be estopped from claiming such rights by their acts and conduct, as in this case by release and judgment to that effect. *Irwin v. Charlotte*, 109.

DEEDS AND CONVEYANCES—*Continued.*

2. *Deeds and Conveyances—Alleys—Estoppel in Pais.*—Where the original owner of land in a city block has divided the same into business lots through which he has run a ten-foot alley with the right of its use for the purposes of a hotel he constructed thereon, and has conveyed to an owner of a different lot adjoining the alley the right of a like use therein, and has sold one or more of the subdivided lots to a purchaser who took with implied notice under registered deeds of the rights in the alleyway so conveyed, and also with actual notice, and has permitted the purchaser of the alleyway rights to use the same for a period of years, and to make heavy expenditures in contemplation of such use: *Held*, the purchaser of the lots adjoining the alley, is estopped in equity to deny the rights of the purchaser of the easement to use the same, and the principles applying to easements appendent, or appurtenant to lands or in gross is not controlling. *Meyer v. Reaves*, 172.

3. *Deeds and Conveyances — Delivery of Deed — Issues — Questions for Jury.*—No title passes by a deed to lands until its delivery and acceptance, and where an issue is properly raised as to this fact, the question is one for the jury. *Ellis v. Ellis*, 216.

4. *Deeds and Conveyances — Gifts — Parent and Child — Registration—Statutes.*—A deed of gift of lands from a mother to her son is void *ab initio* unless registered in two years under the provisions of our statute, C. S., 3315. *Booth v. Hairston*, 278.

5. *Same—Wills—Devise.*—And where the son has failed to register his deed as the statute requires, for whatever reason, he may not successfully claim the lands against a devise thereof to his sister's child under the will of her grandmother, it appearing that the mother continued for more than two years to exercise absolute ownership over the lands until the date of her death. *Ibid.*

6. *Same—Curative Statutes.*—Where a mother has made a deed of gift of her lands to her son, who has failed to have it registered in the time required by C. S., 3315, and it is for that reason void, a later curative statute extending the time for registration cannot revive the void deed to the son, under the facts, vested right thereunder having been acquired. Constitution of North Carolina, Art. I, sec. 17. *Ibid.*

7. *Deeds and Conveyances—Principal and Agent—Attorneys in Fact—Execution of Instruments.*—A deed by an attorney in fact to pass title to his principal's land, must not only expressly show that its execution was that of the principal, but it must also appear from the signature that it was the act and deed of the principal executed by the agent in his name. *Ramsey v. Davis*, 395.

8. *Same—Equity—Contracts—Title.*—Where in a partition for the division of lands among tenants in common, sole seizin by one of them is set up under a deed purporting to have been executed by an attorney in fact of the others, but the deed is insufficient to convey the title of the principals for want of stating this fact sufficiently in the body of the deed and in its execution, in the absence of allegation for equitable relief in behalf of the grantee in the supposed deed, and of necessary parties, the courts will not declare that the instrument

DEEDS AND CONVEYANCES—*Continued.*

operates in equity as a contract to convey under the doctrine that such courts will regard that as done which should have been done. *Ibid.*

9. *Deeds and Conveyances—Mortgages—Forgeries.*—Where pending negotiations in sale of the fee-simple unincumbered title to lands, the attorney for the proposed purchaser discovers a duly registered mortgage against the lands uncanceled of record in the office of the register of deeds, and the attorney for the owner agrees to have the same canceled of record; and thereafter surreptitiously obtains the cancellation stamp of the register of deeds and forges his signature so that apparently the mortgage was canceled under the provisions of C. S., 2594, sub-sec. 2, and relying thereon the proposed purchaser accepts the deed and pays the consideration: *Held,* the supposed cancellation of the mortgage was void as against the mortgagee who had no notice thereof until immediately before bringing his action to have the supposed cancellation declared void. *Ins. Co. v. Cates,* 456.

10. *Same—Burden of Proof.*—In the mortgagee's suit to have declared void the forged cancellation of his mortgage appearing by endorsement on the books of the register of deeds, the burden is on the plaintiff to establish the forgery by the preponderance or greater weight of the evidence. *Ibid.*

11. *Same—Instructions—Appeal and Error—Harmless Error.*—An instruction that the plaintiff had the burden of proving his case by clear, strong and cogent proof, when he is only required to do so by the preponderance of the evidence, is not reversible error to defendant's prejudice. *Ibid.*

12. *Deeds and Conveyances — Consideration — Assumption of Mortgage Debt — Mortgages — Foreclosure — Equity — Exoneration.*—Where a mortgage on lands describes two separate tracts of land in their order as No. 1 and No. 2, and the owner has since conveyed No. 2 to a grantee who has assumed the mortgage debt as a part of the consideration he has paid for the deed, the doctrine of equality is equity does not apply, and in a judgment of foreclosure the second tract should first be sold, and the proceeds applied to the satisfaction of the mortgage debt in favor of the purchaser of the first tract, in whose deed there was no such provision. *Ibid.*

13. *Deeds and Conveyances—Husband and Wife—Wife's Deed to Husband —Statutes.*—The validity of a deed to lands made by the wife to her husband rests solely by statute, which is to remove the common-law irrebuttable presumption that such was for the husband's benefit, and in order to effectuate the intent of the statute, the conclusion by special probate of the officer must state that the conveyance to her husband of the wife's separate lands was not unreasonable, as well as injurious to her. C. S., 2515. *Caldwell v. Blount,* 560.

14. *Same—Interpretation of Statutes—Derogation of Common-Law Right.*—The statute permitting a conveyance of her separate lands by the wife to the husband must be strictly construed, being in derogation of her common-law right, as to whether its terms are substantially complied with. C. S., 2515. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

15. *Same—Estates—Curtesy.*—Where the husband has had children by the wife of his first marriage, and he has received an invalid deed from her of her separate lands, after her death he has only an estate for life therein as tenant by the curtesy, and under foreclosure sale under a mortgage given by himself and his second wife, only such life estate may be conveyed to the purchaser. C. S., 2515. *Ibid.*

16. *Deeds and Conveyances—Title—Betterments.*—Where one is in lawful possession of lands under an apparent right to demand title from the owner, and places improvements thereon, upon eviction, if he claim betterments, he must account for rents. *Parish v. Hill*, 665.

17. *Deeds and Conveyances—Restrictions—Reference to Former Deeds—Description—Identification.*—Where a development company has divided lands into lots, platted the same, etc., and conveyed the lots to different purchasers by deeds not uniform in their restrictions as to the character and costs of dwellings to be thereon erected, and not evidencing a general scheme of development in this respect: *Held*, one of these lots with such restrictions conveyed to the original owner and sold by it without restrictions of this character, may be conveyed by it to another purchaser freed therefrom, and a mere reference in the conveyance to the former deed containing the restrictive clause is insufficient to incorporate the restrictions of the deed referred to, the reference evidently being for the purpose of identifying the lands. *Ivey v. Blythe*, 705.

18. *Deeds and Conveyances—Restrictions as to Buildings—Land Development Companies.*—Where a general scheme of development of an area of land into lots platted and sold with reference to streets, etc., laid off therein containing restrictions as to the kind of dwellings to be erected thereon, is not alleged in the complaint in a suit by the owners of some of these lots seeking injunctive relief against other purchasers from erecting a class of residences inhibited in their own deeds, a demurrer to the complaint is good. *DeLaney v. VanNess*, 721.

19. *Same—"Dwellings"—Apartment Houses.*—Where the restrictions in a deed in a general scheme of selling an area of land into lots contains a building restriction that the houses shall be "dwellings," the word "dwellings" so used is construed to include apartment houses in which several families dwell, in the absence of other descriptive words that would further restrict the character of the dwellings which may be erected on the lots, as where it is stated not more than one dwelling may be erected. *Ibid.*

20. *Deeds and Conveyances—Mortgages—Probate—Registration—Clerks of Court—Liens—Statutes.*—Where the clerk of the Superior Court is the grantee in a mortgage on lands, his passing upon the sufficiency of the probate before a notary public is a judicial act which the statute forbids, and cannot have the effect of giving his subsequent registration of the instrument priority of lien over a subsequent mortgage, properly probated and prior registered. C. S., 3305. *Norman v. Ausbon*, 791.

21. *Same—Statutes — Courts — Legislative Powers.*—The requirements of our statute as to certain other officials who shall pass upon the suffi-

DEEDS AND CONVEYANCES—*Continued.*

ciency of probate of mortgages when the clerk of the court is a mortgagee, in order to give priority of lien over those subsequently registered, must be observed in order for a valid registration of the instrument, it being a matter referred to the legislative branch of the government, with which the courts may not interfere. C. S., 3305, 939(3), 3929, 3293, 3309. *Ibid.*

DEFAULT AND INQUIRY. See Judgments, 15, 21; Officers, 1; Clerks of Court, 1.

DEFECTS. See Municipal Corporations, 5.

DELAY. See Insurance, 6, 7.

DELIVERY. See Deeds and Conveyances, 3; Insurance, 16.

DEMURRER. See Actions, 1, 3, 8, 9; Courts, 1; Pleadings, 2, 5; Bills and Notes, 8; Mandamus, 1; Evidence, 18; Municipal Corporations, 11; Wills, 14.

1. *Demurrer—Evidence—Statutes.*—A demurrer to the evidence will not be sustained if it is sufficient under a liberal construction to sustain the plaintiff's action. C. S., 535. *S. v. Bank*, 524.

DEPOSITIONS. See Evidence, 28.

DEPOSITS. See States, 1; Debtor and Creditor, 2; Banks and Banking, 4, 8.

DESCENT AND DISTRIBUTION. See Parent and Child, 1; Estates, 5.

DESCRIPTION. See Deeds and Conveyances, 17.

DETOUR. See Highways, 10.

DEVISE. See Deeds and Conveyances, 5; Wills, 4, 7, 15; Contracts, 3; Estates, 6.

DIRECTING VERDICT. See Instructions, 8, 9, 10; Evidence, 26.

DIRECTORS. See Corporations, 1, 4, 6.

DIRECTOR-GENERAL. See Government, 2.

DISCRETION. See Highways, 1, 2, 3; Education, 1.

DISCRETION OF COURT. See Pleadings, 1; Removal of Causes, 11; Courts, 6; Continuance, 1.

DISCRIMINATION. See Constitutional Law, 6; Municipal Corporations, 4.

DISMISSAL. See Appeal and Error, 3, 39; Pleadings, 5.

DIVERSE CITIZENSHIP. See Removal of Causes, 1.

DIVISION. See Appeal and Error, 17; Tenants in Common, 1.

DIVORCE. See Judgments, 20.

1. *Divorce—Alimony Pendente Lite—Counsel Fees—Statutes—Evidence—Appeal and Error—Record.*—Under express provisions of 3 C. S., 1667, the wife, in her action for divorce *a mensa et thoro*, may apply

DIVORCE—*Continued.*

to the court for alimony or subsistence to be allowed her *pendente lite*, and for her counsel fees in accordance with the value of her husband's estate considered with her lack of separate means. When sufficient allegation is made by her in her complaint, a denial in the answer raising an issue for a later determination of the jury before final decree in the proceeding for the divorce sought by her in her action, and on this appeal by the husband: *Held*, it does not appear of record that he was not afforded opportunity to introduce his evidence, and the temporary order allowing her alimony is sustained. *Vincent v. Vincent*, 492.

DOWER. See Tenants in Common, 1.

DRAFTS. See Sales, 5.

DRAINAGE DISTRICTS. See Government, 1.

1. *Drainage Districts—Liens—Assessments—Foreclosure—Deeds and Conveyances—Actions.*—Where the lands of an owner within a drainage district formed under the provisions of C. S., ch. 94, subch. 3, are sold for the nonpayment of assessments for the cost of improvements made according to law, such owner is given under the terms of the statute applicable one year within which to pay the amount of the assessment, when the county buys them at the sheriff's sale, with the costs, interest and other charges authorized by the statute, and this applies to his right against any purchaser whether he elects to exercise his statutory right to foreclose the lien or that of obtaining the sheriff's deed to the lands. C. S., 5361, 8010, 8024, 8033, 8037, 8038, 8039. *Drainage Comrs. v. Lumber Co.*, 21.

2. *Drainage Districts — Mattamuskeet Drainage District — Courts—Procedure—Statutes.*—Under the statutory proceedings for the formation of the Mattamuskeet Drainage District, only the lands therein are to be assessed according to benefits received, and no assessments are to be made against lands not benefited, and a party dissatisfied with the assessments against his lands may appeal, these matters to be determined by the court upon which jurisdiction is conferred by the statute. C. S., 5323, 5329, 5324. *O'Neal v. Mann*, 153.

3. *Same—Courts—Judgments—Motions in the Cause.*—The proceedings prescribed by statute for the formation of the Mattamuskeet Drainage District is judicial and not administrative, the remedy of such owners who claim their lands have been assessed without benefit being by motion in the cause after the judgment has been entered against them in the proceedings before the clerk. *Ibid.*

4. *Drainage Districts — Mattamuskeet Drainage District — Quasi-Public Corporations—Government.*—The Mattamuskeet Drainage District is a statutory organization involving ultimately the public interest, but is primarily for the benefit of the private owners of land therein, and forms them into a *quasi*-public corporation conferring the power of eminent domain, and is not strictly speaking a subagency of the government in the administration of its local affairs. *Ibid.*

5. *Drainage Districts—Mattamuskeet Drainage District—Courts—Judgment—Res Adjudicata—Estoppel — Assessments.*—While land under

DRAINAGE DISTRICTS—*Continued.*

the provisions of the statute included in the Mattamuskeet Drainage District may be included against the consent of the owners, it may not be assessed unless in proportion to benefits conferred thereon, but when assessments have been made in the proceedings in the court designated by the statute, and have been finally adjudicated therein, the final judgment is *res adjudicata* as to such assessment, and will operate as an estoppel, unless changed or modified by a motion in the cause. *Ibid.*

6. *Same—Assessments—Status of Incorporation—Members—Petitioners.* Under the provisions of the statute creating the Mattamuskeet Drainage District, those who have their lands located within the district and who have not signed the petition, become members of the corporation so formed involuntarily by virtue of the judgment entered, which has assessed all the lands according to the benefits conferred, in which those who have signed the petition have an interest arising from the fact that to disturb or diminish the assessments of those who claim no benefit to their land, would either increase the assessments or render the assessments laid in the proceedings insufficient for the required purpose of the organization. *Ibid.*

7. *Same—Vested Rights—Constitutional Law.*—The rights of landowners in the Mattamuskeet Drainage District having been determined in a court having jurisdiction as to assessments in proportion to the benefits conferred, cannot be affected by chapter 7, Public Laws of 1921, providing that "the districts heretofore or hereafter created under the law shall be and constitute political subdivisions of the State," later enacted, for such would be to impair the vested rights of those whose property had been assessed by the final judgment. *Ibid.*

8. *Same—Statutes—Retroactive Laws.*—The Legislature has no power to impair vested rights acquired by landowners in the Mattamuskeet Drainage District under the final judgment of the court in proceedings in conformity with the statutes, by afterwards declaring that the district was a political subdivision of government upon the ground that over such agencies the Legislature has larger powers. Const. of N. C., Art. VII, sec. 12; Art. VIII, sec. 1. *Ibid.*

9. *Drainage Districts — Assessments — Benefits — Enlarging Districts—Judgments—Res Judicata.*—When under the provisions of C. S., 5320 a drainage district has been formed within certain boundaries with the assessments of the lands of the owners therein regularly made in accordance with the benefits to be acquired, and the matter proceeds to final judgment as the statute prescribes, excluding the *locus in quo* from the assessment rolls, the question of benefits is *res judicata*, and a supplementary petition to enlarge the boundaries of the established district so as to include contiguous lands and to subject them to assessment for benefits received may not be entertained, and a demurrer *ore tenus* and a motion to dismiss the petition for want of authority will be sustained. 3 C. S., 5373(a). *Drainage District v. Cahoon*, 326.

10. *Same—Interpretation of Statutes.*—While statutes establishing drainage districts are to be liberally construed (C. S., 5379) and many corrections necessarily made as the work progresses, and the proceed-

DRAINAGE DISTRICTS—*Continued.*

ings subject to the filing of supplementary petitions, bringing the proceedings forward by interlocutory orders upon notice, etc., this does not extend to the final judgment determining the question of assessments of owners of land as to benefits received, or to permit the enlargement of the district to take in the owners of adjoining lands. *Ibid.*

11. *Drainage — Districts — Assessments — Interest—Statutes.*—Owners of land in a drainage district in default in the payment of assessments thereon on the first Monday of September, when under the provisions of the statute, C. S., 5361, they are due and payable, are chargeable with interest from that date, and the provisions of C. S., 7994, allowing certain discounts and imposing certain penalties, has no application. *Drainage Comrs. v. Bordeaux*, 627.

12. *Same—Interpretation of Statutes—Retroactive Effect.*—The provisions of C. S., 5362, authorizing the sheriff of the county wherein is located a drainage district to levy and collect the assessments against the delinquent owners out of their other property by levy, etc., are those included in chapter 442, Public Laws of 1909, as amended by chapter 67, Public Laws of 1911, and cannot be given a retroactive effect. *Ibid.*

DRAINS. See Drainage Districts.

DRUNKENNESS. See Homicide, 4, 12.

DUE COURSE. See Bills and Notes, 7, 8; Contracts, 9.

DURESS. See Bills and Notes, 4.

DUTIES. See Master and Servant, 1; Negligence, 3; Appeal and Error, 41.

DWELLING. See Criminal Law, 6; Deeds and Conveyances, 19.

DYING DECLARATIONS. See Homicide, 5.

EDUCATION.

1. *Education—Counties—Statutes—Limits for Transportation of School Children—Discretionary Powers.*—Under the express provisions of statutes, 2 C. S., 5412, 3 C. S., 5489, the county board of education has the power, within its sound discretion, to prescribe and define the lines of demarcation within which children of the public school age may be transported by the county to a given public schoolhouse, and have it applied in general terms to all such children living beyond the lines so fixed. *Hayes v. Benton*, 379.

ELECTION. See Wills, 7.

ELECTION OF REMEDIES. See Contracts, 14.

1. *Election of Remedies—Conflicting Remedies—Principal and Surety—Insurance—Indemnity—Policies—Contracts—Actions at Law—Equity—Judgments—Estoppel.*—Where a party has elected to pursue a remedy at law, with knowledge of the facts, and is unsuccessful therein, he may not thereafter apply to a court of equity for the same relief, the remedies being directly opposed to each other, and where the insured under an indemnity bond against liability for negli-

ELECTION OF REMEDIES—*Continued.*

gent injury to other than its employees has unsuccessfully pursued its remedy under its policy contract, he may not, after final judgment therein, maintain a suit to reform the same instrument and recover under the provisions of the contract as and when reformed. *Power Co. v. Casualty Co.*, 618.

ELECTRICITY. See Evidence, 17; Negligence, 7.

EMBEZZLEMENT. See Arrest and Bail, 1; Criminal Law, 4.

EMINENT DOMAIN.

1. *Eminent Domain—Condemnation—Damages.*—In proceedings for the taking a part of the respondent's farming land in condemnation by a *quasi*-public corporation for the purpose of building a dam and ponding water thereon, the respondent may recover as his damages not only the value of the land so taken at the institution of the proceedings, but also damages to the remainder of the tract caused by the ponding of water upon the part so used. *Power Co. v. Hayes*, 104.

2. *Same—Evidence—Time at Which Damages Are to be Ascertained.*—The respondent in proceedings to condemn his lands for ponding water thereon, may introduce evidence of its market value before and after the work had been commenced when relevant to its value at the time of the institution of the proceedings. *Ibid.*

3. *Eminent Domain—Condemnation—Damages—Issues.*—Where damages for the taking of the owner's lands by condemnation are to be ascertained in the proceedings, the better practice is suggested that a separate issue be submitted to the jury upon each distinctive element thereof. *Ibid.*

4. *Eminent Domain—Condemnation—Appeal and Error—Schools—Board of Education—Party Aggrieved.*—In an action brought by a county board of education to condemn lands for public school purposes, where the statute has been regularly followed as to the procedure, and accordingly the appraisers appointed have viewed the lands and made a report of the amount of damages to be paid to the owner: *Held,* the board of education does not come within the meaning of the words "party aggrieved" as contemplated by the statute, and in the absence of statutory provision allowing it, the board is not entitled to appeal to the courts on the ground of excessive damages, and the award so made is final. 3 C. S., 5469. *Board of Education v. Forrest*, 519.

5. *Same—Appeal and Error.*—Under the provisions of 3 C. S., 5469, relating to appeals in the proceedings for condemnation of lands by the county board of education for public school purposes, by requiring that on appeal the party aggrieved by the award of the appraisers give to the board a bond on appeal, is construed to apply in case of appeal only to the person or persons whose land is so taken. C. S., 1715-1723, has no application to this case. *Ibid.*

EMPLOYER AND EMPLOYEE. See Master and Servant.

ENDORSEMENT. See Bills and Notes, 7; Actions, 8.

ENTIRETIES. See Mortgages, 1; Estates, 1; Husband and Wife, 2.

EQUITY. See Courts, 1; Bills and Notes, 9; Deeds and Conveyances, 1, 8, 12; Limitation of Actions, 1; Reformation of Instruments, 1; Contracts, 6, 8; Estates, 1; States, 2; Election of Remedies, 1; Evidence, 18, 27; Municipal Corporations, 7; Judgments, 13; Receivers, 1, 3; Officers, 3; Release, 1; Wills, 16.

ESCAPE. See Convicts, 1.

1. *Escape—Convicts — Guards — Misdemeanors.*—The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or doing anything that would suggest danger to the person of the guard. *Holloway v. Moser*, 185.

2. *Same—Actions—Civil Liability.*—A civil action will lie to recover damages of a guard for unlawfully killing a convict under his charge convicted of a misdemeanor, while the deceased was endeavoring to escape. C. S., 160. *Ibid.*

3. *Same — Statutes—Felons—Misdemeanors—Common Law.*—The provisions of C. S., 7745, relate to the authority of a convict guard in preventing the escape of those under his control, who are convicted of a felony justifying the guard in using any means necessary to prevent an escape even to the taking of human life, under justifiable circumstances, and does not apply when the one attempting to escape has been only convicted of a misdemeanor, the common law applying in such instances. *Ibid.*

ESTATES. See Mortgages, 1; Wills, 6, 18, 19; Husband and Wife, 2; Deeds and Conveyances, 15.

1. *Estates—Entireties—Husband and Wife—Murder—Equity—Trusts.*—Where husband and wife hold estate by entireties, and the husband has murdered the wife, and her expectancy of life has been legally determined to have been longer than his own, equity will decree that he hold the legal title to lands held by them in entireties in trust for her heirs at law until his death, subject to his right of management and the use of the rents and profits for his own life. C. S., 2522, is not applicable. *Bryant v. Bryant*, 372.

2. *Same—Injunctions.*—Where a husband has murdered his wife, and is attempting to sell lands held by them in entireties and to convey the legal title under the principle of survivorship, equity will afford injunctive relief in favor of the wife's heirs at law, for whom he holds as trustee. *Ibid.*

3. *Estates—Remainders—"Issue"—Children—Rule in Shelley's Case.*—A devise to B. for his use or benefit as long as he lives, and at the time of his death to go to his issue: *Held*, the word "issue" is construed as children who take in remainder by purchase, the rule in *Shelley's case* not applying. *Bobbitt v. Pierson*, 437.

4. *Estates—Rule in Shelley's Case—Fee Simple—Deeds and Conveyances.* Where in the premises of a deed lands are conveyed to B., "and to his heirs and assigns forever," and after the description of the land, "to and for B. during his natural life, and after that to the heirs of his body only, followed by the *habendum* "to have and to hold . . . unto the said party of the second part, his heirs and assigns forever": *Held*, B. takes an estate in fee. *Foley v. Ivey*, 453.

ESTATES—*Continued.*

5. *Estates — Wills — Contingent Remainders—Vested Interests—Descent and Distribution.*—A devise of an estate to the widow of the testator's son during her life, "but in case she dies the property to go to her surviving children": *Held,* the estate goes to such children surviving the widow or tenant for life, and where her son dies during its continuance his heirs at law cannot claim under him by descent. *Jessup v. Nixon,* 640.

6. *Estates—Wills—Devise—Rule in Shelley's Case—Contingent Remainders—Life Estates.*—An estate to the testatrix's daughter for the term of her natural life, and at her death to her bodily heirs as entailed from generation to generation, further qualified so that the living children at the death of the first taker shall share equally: *Held,* those taking under the further limitation do not take as her heirs or the heirs of the ancestor, and interpose a life estate with a contingent limitation over to such of the children living at her death *per capita* and not *per stirpes,* and prevents the application of the rule in *Shelley's case* giving the first taker during her life having living children an absolute fee-simple title. *Welch v. Gibson,* 684.

7. *Same—"Heirs."*—In order for the application of the rule in *Shelley's case* the limitation over to the heirs of the body under a devise must be such heirs as would take (except for the intervention of our statute, C. S., 1734), under the law by descent in the class designated by the will, and where there is a contingent limitation over to those who would take a different estate not *per stirpes,* or as a class different from heirs, the two estates will not merge during the life of the first taker so that he can convey the fee-simple absolute title. *Ibid.*

ESTATE BY ENTIRETIES. See Contracts, 8.

ESTOPPEL. See Arbitration and Award, 1; Corporations, 1; Deeds and Conveyances, 1, 2; Drainage Districts, 5; Judgments, 1, 7, 10, 11, 13, 14; Wills, 7; Contracts, 3; Tenants in Common, 1; Election of Remedies, 1.

EVIDENCE. See Contracts, 13; Actions, 2, 4; Divorce, 1; Appeal and Error, 2, 5, 7, 9, 10, 11, 19, 20, 21, 28, 34, 36, 46; Bills and Notes, 3, 4, 9; Damages, 3; Counties, 2; Criminal Law, 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, 21, 22; Eminent Domain, 2; Banks and Banking, 7; Homicide, 4, 5, 6, 7, 11, 13, 15, 16, 17, 18, 19, 20, 21; Instructions, 4, 8, 9, 10; Insurance, 2, 8, 19; Limitation of Actions, 1; Negligence, 2, 3, 10, 13, 18, 20, 22, 24, 26; Principal and Surety, 1, 2; Reference, 3; Reformation of Instruments, 2; Carriers, 2; Issues, 1; Bailment, 7; Mechanics' Liens, 1; Sales, 3; Trials, 1; Wills, 11; Arrest and Bail, 3, 4; Corporations, 7, 8; Master and Servant, 1, 2, 3; Demurrer, 1; Highways, 11.

1. *Evidence—Title—Color—Adverse Possession—Grants.*—A grant from the State covering the land concerning which the title is in dispute, is not required to be registered before the commencement of the action when registered before the trial, when introduced by the plaintiff for the sole purpose of showing title out of the State, and he has pleaded and relied on title by adverse possession under "color." *Pennell v. Brookshire,* 73.

EVIDENCE—*Continued.*

2. *Evidence—Objections and Exceptions—Motions to Strike Out—Appeal and Error.*—Where the question and answer of the witness testifying upon the trial are not duly objected to at the time, the appellant must move in apt time to have the evidence stricken out, for his exception to be considered on appeal. *Ibid.*

3. *Evidence—Title—"Color"—Adverse Possession.*—Where the plaintiff in the action involving title to land relies upon adverse possession under "color," he may recover upon his evidence thereof without the introduction of a grant from the State to the *locus in quo* for the purpose of showing that title was out of the State, under the presumption raised by our statute, C. S., 426, 3315, 7579. *Ibid.*

4. *Evidence — Title—Adverse Possession — Grants — Statutes—Presumptions.*—Where the plaintiff relies on adverse possession under color, and in the conveyance under which she claims color refers to the land as "the Crouch tract," it is competent for a witness to testify that the *locus in quo* was generally known by that name. *Ibid.*

5. *Evidence—Title—Color—Adverse Possession—Restricted Possession—Deeds and Conveyances—Boundaries.*—By his acts and declarations one claiming under title by adverse possession may show that his claim is within the boundaries given in the deed under which he relies as "color." *Ibid.*

6. *Evidence—Hearsay—Letters—Appeal and Error—Trials—Error Cured.* Letters written by those who were not witnesses upon the trial are erroneously admitted as hearsay, but may not be considered so if they are thereafter used in evidence or referred to without further objection from the appellant. *Trust Co. v. Store Co.*, 122.

7. *Evidence—Issues—Fraud—Nonexpert Witnesses—Appeal and Error.*—Where fraud in the procurement of a sale of stock is the issue in the action, it is reversible error, for which a new trial will be granted on appeal, for the defendant's witness to broadly testify that no fraud was practiced therein, it being a question for the sole determination of the jury, and not falling within the exception to the rule as to the admission of testimony of a nonexpert witness upon a collective fact. *Ibid.*

8. *Evidence—Letters—Proof Required—Primary and Secondary Evidence.* Letters offered as evidence upon matters directly relating to questions in controversy and not collateral thereto, must be sufficiently identified as genuine, and where the letter itself is not produced, its absence or loss must be sufficiently accounted for to admit evidence of its contents. *Bank v. Brickhouse*, 231.

9. *Same—Hearsay—Bills and Notes—Negotiable Instruments—Notice of Infirmity of Instrument.*—Where a bank claims a negotiable instrument as holder in due course for value, without notice of its infirmity, a letter purporting to have been written by the president of the bank showing notice of the infirmity alleged in defense of its action thereon, is incompetent as hearsay in the absence of evidence of its genuineness. *Ibid.*

10. *Evidence—Witnesses—Character—Criminal Law—Instructions—Appeal and Error.*—Upon a trial for violating the prohibition law, the de-

EVIDENCE—*Continued.*

fendant does not place his own character in evidence as to the particular offense charged against him merely by taking the witness stand, and a charge of the court that a bad reputation of this kind if so found by the jury could be considered as corroborative evidence of the State's witnesses, is reversible error to the defendant's prejudice. *S. v. Colson*, 236.

11. *Same—Qualification—Cross-Examination.*—Before evidence as to the character or general reputation of a party is admissible, the witness should first testify as to his knowledge; and if upon direct examination he testifies in the affirmative, the following questions should be directed to general character, permitting the witness to specify; and on cross-examination questions as to particular matters may be asked and the answer of the witness is not subject to contradiction. *Ibid.*

12. *Evidence—Credibility—Questions for Jury.*—The weight and credibility of competent evidence are questions for the jury. *S. v. Maragousis*, 246.

13. *Evidence—Declarations — Hearsay — Appeal and Error—Prejudice.*—Where the evidence upon trial for murder is that two men went together to the store of deceased, one waited at the door and the other entered and assumed to purchase merchandise from the deceased, and shot and killed him without warning, declarations by one of them in whose favor a verdict of not guilty was directed, not made in the presence of the other, identifying the other as the guilty one, are incompetent as hearsay evidence, and their admission as evidence constitutes prejudicial and reversible error. *S. v. Green*, 302.

14. *Evidence — Negligence — Nonsuit.* — Under the evidence in this case, viewed in the light most favorable to the plaintiff, defendant's motion as of nonsuit was properly denied. *Hart v. R. R.*, 317.

15. *Evidence—Telephone Conversation—Principal and Agent—Representations.*—In order to bind an alleged partnership for a contract of purchase made by a supposed copartner by telephone, it is necessary to identify by the voice of the party speaking and representing himself to be a member of the firm, when sole reliance is made thereon: and evidence that the witness was uncertain thereof, but that the speaker representing himself as such, is alone insufficient to take the case to the jury. *Mfg. Co. v. Bray*, 350.

16. *Evidence—Nonsuit.*—Upon a motion as of nonsuit under our statute the evidence is to be taken in the light most favorable to the plaintiff, with every reasonable intendment, and every reasonable inference to be drawn therefrom. *Ellis v. Power Co.*, 357.

17. *Evidence—Negligence—Nonsuit—Instructions—Electricity—Dangerous Instrumentalities.*—Evidence that the 9-year-old intestate of plaintiff was found dead with the uninsulated end of the defendant electric company's live wire in his hands; that this was on an abandoned side line connected with the main line carrying a deadly voltage, and ran some fifteen feet from a frequented pathway used by the family of the intestate, which the intestate had used on this occasion in going home from Sunday school; that on prior occasions these wires had shocked others, and the defendant should have known thereof by

EVIDENCE—*Continued.*

reasonable inspection, and that close to the place where the intestate's hands had clasped the deadly uninsulated wire there was a glass insulator around which the wire had been wrapped, and which was on a rotten cross-arm that had been supported by the pole, is *held* sufficient to take the case to the jury upon the defendant's motion as of nonsuit, and to deny its request for a peremptory instruction in its favor upon the issue of actionable negligence. *Ibid.*

18. *Evidence — Demurrer — Equity — Reformation of Instruments—Cross-Action—Defenses.*—Where equity is sought to remove a cloud upon title to lands by those claiming the reformation of their conveyance into a deed conveying a fee-simple absolute title by reason of judgment liens against the former owner obtained subsequent to the registration of the plaintiff's deed, and the defendants, the judgment creditors, set up a cross-action asking affirmative relief on the grounds of fraud against their rights, and therefore no title had passed to the plaintiff, with evidence to support their allegations, plaintiff's demurrer to the defendant's evidence admits every material fact reasonably to be inferred therefrom, and the validity of the plaintiff's title being directly involved, the plaintiff's demurrer thus interposed is bad, and is properly denied. *Trust Co. v. Bank,* 528.

19. *Evidence—Letters—Carbon Copies.*—Unsigned carbon copies of letters are incompetent evidence of their contents without identification as to the person against whose interest on the trial they are sought to be introduced. The general requirements as to the competency of letters as evidence, when mailed, the identification of the writer, their mailing and receipt, notice to produce, etc., stated by *Brogden, J. Chair Co. v. Crawford,* 531.

20. *Evidence—Nonsuit—Questions for Jury—Insurance, Life—Payment of Premiums.*—Where there is a provision in a policy of industrial insurance that the policy would be "in benefit" only upon the payment at a certain time weekly of a specified amount, and there is some evidence from which the jury may reasonably infer that this condition had been complied with by the insured, the issue should be answered by the jury, and a judgment as of nonsuit upon the evidence in the case is erroneously entered. *Moore v. Ins. Co.,* 538.

21. *Evidence—Written Instruments—Letters—Original Writings—Copies.* The original of a letter sought to be introduced in evidence, unless collateral to the controversy or issue, is the best evidence of its contents, and a copy may not be received unless it is shown by competent witnesses that it had been destroyed or lost, and could not be found after a reasonable search. *Harris v. Singletary,* 583.

22. *Same—Clerks of Court—Justice's Courts.*—Where a letter introduced on a trial of a criminal action is transmitted on defendant's appeal to the clerk of the Superior Court, a copy thereof of record may not be testified to on the trial of a civil action for false arrest in the Superior Court, when involved in the issue, without showing the loss of the original by the clerk to whom it had been given, or showing by a recognized legal way that the original could not reasonably have been introduced. *Semble,* a justice's court is partly one of record under C. S., 1482. *Ibid.*

EVIDENCE—*Continued.*

23. *Evidence—Appeal and Error—Admissions.*—Where the defendant in an action for damages for false arrest has admitted substantially the contents of a letter material to the inquiry, and not collaterally involved thereon, the erroneous admission of a copy thereof is cured. *Ibid.*

24. *Evidence — Appeal and Error — Objections and Exceptions—Cross-Examination—Waiver.*—Where testimony of a witness has been erroneously admitted by the court to be introduced at the trial after the appellant had duly and properly excepted thereto, upon cross-examination he may question the same witness upon the subject-matter of his exception without waiving any of his rights on appeal. *Shelton v. R. R.*, 670.

25. *Evidence—Criminal Law—Character—Instructions.*—Where the prisoner on trial for a homicide has admitted when a witness in his own behalf, that he had been imprisoned several times for breaking the criminal law in other and minor offenses, an instruction stating these admissions and confining them as evidence only in relation to the truth of his other testimony is not error. *S. v. Johnson*, 701.

26. *Evidence—Trials—Nonsuit—Directing Verdict.*—Defendant's motion as of nonsuit, or a directed verdict in its favor, will be denied when the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment therefrom, is sufficient to take the case to the jury and support a verdict as a matter of law in the plaintiff's favor. *Robinson v. Ivey*, 805.

27. *Evidence — Right to Cross-Examine Witnesses.*—Where a cause has been referred and regularly proceeded with before a commissioner to take depositions therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law. *Sugg v. Engine Co.*, 814.

28. *Same — Reference — Report of Referee — Deposition Stricken Out — Statutes.*—Where a commissioner to take depositions has, over the objection and exception of a party litigant, denied him the right of cross-examination of a witness of his opponent, and has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken out. C. S., 1820. *Ibid.*

29. *Same—Motion.*—Where a motion to suppress a deposition is based upon an irregularity in the way in which it was taken, it should be supported by evidence *alieunde*, therein differing from the appellant's right to have testimony given in the direct examination of a witness taken by deposition suppressed for the refusal of the commissioner to permit him to cross-examine a witness of the opposing party, under his objection and exception duly taken and preserved. *Ibid.*

30. *Same—Bills and Notes—Negotiable Instruments—Collateral—Liens.*—Where the note of a nonresident defendant has been attached in an action brought in the courts of this State, and an interpleader claims as a holder in due course, and makes it to appear that it was taken as collateral security to another note, it is a holder in due course only to the extent of its lien. C. S., 3007. *Ibid.*

EVIDENCE—*Continued.*

31. *Evidence — New Trials — Newly Discovered Evidence — Appeal and Error.*—Under the facts of this case, a motion for a new trial for newly discovered evidence made in the Supreme Court is allowed, the refusal of the motion by the trial judge not being reviewable. *Moore v. Tidwell*, 855.

32. *Evidence—Bailment—Fires—Negligence—Burden of Proof.*—Where an automobile is kept in a garage for repair and has been destroyed by fire, the burden is on the defendant to show that it was not negligent to rebut the doctrine of *res ipsa loquitur*, under the decision in *Beck v. Wilkins*, 179 N. C., 231. *Maloof v. Motor Co.*, 857.

EXAMINATION. See Insurance, 4.

EXCEPTIONS. See Appeal and Error, 11, 22.

EXCUSABLE NEGLECT. See Judgments, 8, 21; Appeal and Error, 27.

EXECUTION. See Deeds and Conveyances, 7; Judgments, 9; Instructions, 9; Sales, 3.

1. *Execution — Judgments — Liens — Levy—Sheriffs—Deeds and Conveyances—Return Day—Void Deeds.*—A judgment is a lien upon lands of the defendant, and upon issuance of an execution the sheriff has such an interest as clothes him with the power to sell only until the date of its return to the court; and a sale made thereafter is void, and the sheriff's deed conveys no title to this grantee. C. S., 614, 672. The distinction pointed out as to execution sales of personal property where the sheriff takes and delivers possession under *fieri facias* and *venditioni exponas*. *Jeffreys v. Hocutt*, 332.

EXECUTORS AND ADMINISTRATORS. See Actions, 7; Courts, 1; Wills, 1, 13.

EXEMPTIONS. See Constitutional Law, 4.

EX MERO MOTU. See Appeal and Error, 40.

EXONERATION. See Deeds and Conveyances, 12.

EXTENSION OF TIME. See Bills and Notes, 6; Mortgages, 8.

FAITH AND CREDIT. See Constitutional Law, 9.

FALSE ARREST. See Arrest and Bail.

FEDERAL COURTS. See Removal of Causes, 1, 5, 9, 10; Courts, 7.

FEDERAL GOVERNMENT. See Constitutional Law, 12.

FEES. See Constitutional Law, 1.

FEE SIMPLE. See Estates, 4; Wills, 6.

FELLOW-SERVANT. See Railroads, 1; Negligence, 17; Master and Servant, 2, 3, 6.

FELONY. See Convicts, 1; Escape, 3.

FINDINGS. See Appeal and Error, 7, 13, 27; Reference, 1; Criminal Law, 17.

FIRE DISTRICTS. See Municipal Corporations, 4.

FIRES. See Bailment, 4; Evidence, 32.

FORECLOSURE. See Drainage District, 1; Mortgages, 2, 5; Deeds and Conveyances, 12; Corporations, 11; Pleadings, 7.

FOREIGN CORPORATIONS. See Actions, 4.

FORGERY. See Deeds and Conveyances, 9; Mortgages, 4, 7.

FORNICATION. See Criminal Law, 8.

FRAUD. See Release, 1; Actions, 1; Arbitration and Award, 1, 3; Banks and Banking, 3; Bills and Notes, 4, 7; Evidence, 7; Limitation of Actions, 1; Negligence, 19.

FRAUD IN THE FACTUM. See Contracts, 14.

FRAUD IN THE TREATY. See Contracts, 12.

FRAUDULENT JOINDER. See Removal of Causes, 1, 6.

GARNISHMENT. See Attachment, 3; Courts, 8.

GIFTS. See Deeds and Conveyances, 4; Husband and Wife, 2; Wills, 12.

GOOD FAITH. See Corporations, 7, 8.

GOODS. See Health, 1.

GOVERNMENT. See Drainage Districts, 4; Constitutional Law, 12; States, 1; Municipal Corporations, 10.

1. *Government — Constitutional Law — Drainage Districts—Branches of Government.*—The creation of the Mattamuskeet Drainage District by the Legislature and providing for the assessments among the landowners therein according to benefits received under the proceedings in court provided by the statute, is not violative of our Constitution providing that the legislative and judicial, etc., departments of our government shall be separate and distinct from each other. Const. N. C., Art. I, sec. 8; C. S., 5312 *et seq.*, ch. 94, Art. 5, subch. 3. *O'Neal v. Mann,* 153.

2. *Government — Limitation of Actions—War—Carriers—Railroads—Director-General.*—The placing of carriers under Federal control as a war measure was the creation of a governmental agency under the Director-General of Railroads, and the statute of limitations will not run against the collection of unpaid freight charges in an action of such Director-General to recover them against the consignee of the shipment. *Davis v. Ford,* 444.

GRAND JURY. See Criminal Law, 2.

GRANTS. See Evidence, 1, 4.

GUARANTY. See Debtor and Creditor, 1.

HABEAS CORPUS.

1. *Habeas Corpus—Insanity—Legality of Detention of Petitioner.*—The question to be determined by the judge in *habeas corpus* proceedings

HABEAS CORPUS—*Continued.*

is the legality of the restraint of the petitioner, and such proceedings are not available as a means of reviewing and correcting mere errors as distinguished from defects of jurisdiction. C. S., 2234, 2235. *In re Chase*, 450.

2. *Same—Certiorari.*—When the petitioner in *habeas corpus* has been adjudged insane and her detention is ordered by a court of lunacy of another state, the judge of the Superior Court in this State by whom the proceedings of *habeas corpus* is heard should determine the validity of the order of the adjudication of insanity when the same is properly presented to him, and this is the determinative question involved, and upon failure to have done so the case will be remanded. *Ibid.*

3. *Same—Courts—Temporary Orders—Restraint—Inquisition of Insanity.* When the judge before whom proceedings in *habeas corpus* are had, involving the question of the petitioner's detention upon the validity of an inquisition of lunacy in another state: *Held*, should the matter be remanded and the proceedings in lunacy be held invalid, and it appears to the trial judge that the petitioner should be restrained on account of present insanity, he may issue a temporary order for her safety and welfare pending proceedings lawfully to be held in such instances. *Ibid.*

HARMLESS ERROR. See Deeds and Conveyances, 11; Appeal and Error, 30, 36, 43; Instructions, 14.

HEALTH. See Courts, 3.

1. *Health — Municipal Corporations — Cities and Towns — Ordinances—Markets—Perishable Goods.*—A city in the exercise of statutory authority may enact a valid penal ordinance as affecting the health of its citizens, and under its police power, require that meats, fish, oysters and perishable matter be sold at a sanitary market building containing refrigeration and other sanitary methods, under proper inspection, where adequate accommodation may be obtained at a reasonable rental, and may exclude such business within a prescribed territory therefrom, the location of the market-house being reasonably suitable to the business or trades specified. *Angelo v. Winston-Salem*, 207.

HEARING. See Injunction, 1.

HEARSAY. See Evidence, 6, 9, 13.

HEIRS. See Wills, 5; Estates, 7.

HIGHWAYS. See Counties, 1; Statutes, 1; Negligence, 4, 8.

1. *Roads and Highways—State Highway Commission—Statutes—Discretionary Powers — Reservation of Powers — Location of Highways—County-Seats.*—The large discretion given by the Legislature to the State Highway Commission was limited by the express words of the statute to exclude the relocation of public highways connecting the various counties of the State, disconnecting them or making any change, alteration or discontinuance when such would exclude county-seats existing along the highways, or the principal towns located along the route. *Carlyle v. Highway Commission*, 36.

HIGHWAYS—*Continued.*

2. *Same—Mandatory Statutes—Discretion.*—The requirement of the statute that the public system of highways under the control of the State Highway Commission must "run to" and "connect" with county-seats, is mandatory, withdrawing from its large discretionary powers that of relocating one of these roads contrary to this statutory provision. *Ibid.*

3. *Same—Exercise of Discretionary Powers—Final—Statutes.*—Where the State Highway Commission has complied with the formalities prescribed by the statute with regard to a highway leading into and from a county-seat, and has accordingly designated the existing roads as appeared upon the map, as a part of the plan adopted, and according to the terms of the statute has posted the map it has made at the courthouse door in the proper county, and has thereafter continued to so use the roads designated and by its conduct and acts has thus maintained them, its act in so doing is a final determination of the fact that the roads so adopted are the most practical routes within the meaning of the statute, and the exercise thereafter of any discretion in making radical or substantial changes in the location is ineffectual. *Ibid.*

4. *Same—Maps.*—When the Highway Commission has mapped, adopted, selected, established and maintained an existing highway as the sole, separate and independent line connecting two county-seats, this is a location of the road by the commission, and no radical or substantial departure therefrom can be made. *Ibid.*

5. *Statutes—Amendments—Interpretation—State Highway Commission.*—The amendment of the Legislature of 1921 to the laws of 1919, the latter of which referred to county-seats and principal towns, etc., by the use of the words "most practicable route," applies to the connection of the State's highways with the National highways in adjoining states, and not to connecting the county-seats, etc., in the manner required by the former act. *Ibid.*

6. *Roads and Highways—State Highway Commission.*—A contract by a county to loan money to the State Highway Commission upon the agreement that the latter should establish and maintain a highway in its State system of roads, is ineffectual, *Johnson v. Highway Commission*, 192 N. C., 561, cited and applied. *Ibid.*

7. *Same—Adoption of Highway Into System.*—Where by its final determination the State Highway Commission has adopted a highway as a part of the State's system of roads connecting two county-seats of the State, it may not as a discretionary measure, change this route thirteen miles from one of them and consolidate it with another highway which enters the county-seat in question, upon the ground that it would be a saving of expense to the State. *Ibid.*

8. *Roads and Highways — State Highway Commission — Principal and Surety—Contracts—"Materials."*—Where a surety is obligated under the provisions of its bond with the State Highway Commission to pay for the labor and material used in the construction of a State highway in default of the contractor to do so, and the road in question is through a section of the county making it desirable as a good business proposition, and in conformity with general usage of like con-

HIGHWAYS—*Continued.*

tractors under the same or substantially the same conditions: *Held,* supplies of groceries furnished for the consumption of the laborers; gas and oil necessarily used for the machinery employed in its construction, and food for the teams engaged in the project, come within the intent and meaning of the words "materials used in the construction of the road," for the payment of which the surety is liable under its contract. *Overman v. Casualty Co.,* 86.

9. *Same—What Are Not Necessaries.*—Candies, cigars, cigarettes, ginger ale and other soft drinks sold by the contractor at a laborer's camp in the construction of a highway for the State Highway Commission to be paid for by the contractor and charged in the pay roll against the laborers buying them, are not necessaries under the terms of the surety bond on the contract. *Ibid.*

10. *Roads and Highways — State Highways — Detours—Safe Condition—Contracts—Signs.*—The statutory requirement that detours from the State highways where roads are being constructed or repaired shall be kept reasonably safe for public travel and the place thereof marked with specific signs or barriers to notify the traveling public of the menace is mandatory, and where a contractor with the State Highway Commission has expressly agreed in his contract for a particular road to observe these statutory requirements, such contractor is liable in damages to one traveling on the public highway, who was injured in having his car wrecked, as the proximate cause of the contractor's negligence therein. *Hughes v. Lassiter,* 650.

11. *Same—Evidence—Questions for Jury—Nonsuit.*—Evidence held sufficient in this cause to take the issue of defendant contractor's liability to the jury under its express provisions in his contract with the State Highway Commission, which tends to show that the defendant contractor was constructing a certain part of the State highway where it crossed a dangerous place on a railroad track, and had not barricaded the highway at the detour or placed there the required signs, and that the plaintiff driving his car using the detour indicated by the defendant's employee at the place, had carefully approached the railroad track to cross it, having safely passed there the morning of the same day, and the car was injured by a certain imperfection since occurring, and defendant's motion as of nonsuit was properly denied. *Ibid.*

12. *Roads and Highways—Principal and Surety—Indemnity Bonds—Materialmen—Labor—Renting of Necessary Machines and Implements.* The surety on a contractor's bond for the building of a public road or highway is presumed to have acquainted itself with the character of the road contracted for by its principal, and the local conditions that would affect the cost of its construction, and where its bond includes payment by the contractor of labor and material to be employed or used therein, it is liable to one who has rented to the contractor a steam shovel, boiler, etc., necessary to the construction of the highway under local existing conditions. *Wiseman v. Lacy,* 751.

HIGHWAY COMMISSION. See Municipal Corporations, 6.

HOLOGRAPHIC WILLS. See Wills, 8.

HOMESTEAD. See Wills, 3; Instructions, 9; Sales, 3.

1. *Homestead—Allotment Less Than $1,000—Irregularity of Appraisement—Statutes.*—An allotment of a homestead to the value of $800, laid off under execution, does not render allotment void, especially when the plaintiff in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. C. S., 740. *Carstarphen v. Carstarphen*, 54.

HOMICIDE. See Appeal and Error, 1.

1. *Homicide—Justifiable Homicide—Self-Defense—Questions for Jury.*—Where one, without blame on his part, is assaulted by another, and in the exercise of ordinary firmness he actually apprehends or has reasonable grounds to apprehend that his life is in danger, or he is in danger of great bodily harm, he may use such force as reasonably appears to him to be necessary to save his life or to protect himself from great bodily harm, the necessity real or apparent being for the jury to determine upon the evidence: and should the jury so find the homicide is excusable. *S. v. Waldroop*, 12.

2. *Same—Instructions—Appeal and Error.*—Where there is evidence that the prisoner on trial for a homicide was justifiable in taking the life of the deceased, it is reversible error for the judge to insufficiently charge upon the principle of self-defense. *Ibid.*

3. *Homicide—Murder—Verdict—Capital Felony.*—Where a prisoner is tried for murder in the first and second degrees, etc., a general verdict of guilty is insufficient under which to impose the death sentence, it being required that the verdict, under the evidence, specify the greater offense, if they so find the fact to be. C. S., 4200, 4642. *S. v. Ross*, 25.

4. *Homicide—Murder—Capital Felony—Preconceived Intent—Evidence in Rebuttal—Drunkenness.*—There must be a preconceived intention to commit murder in the first degree, which may be rebutted by evidence that the accused was too drunk to have formed it. *Ibid.*

5. *Homicide—Murder—Evidence—Dying Declarations—Defenses.*—Dying declarations on a trial for murder made by the deceased with knowledge of approaching death resulting from a pistol shot in the hands of the defendant, which caused the death, are admissible in behalf of the defendant as tending to show that the death resulted from an accident. *S. v. Blackwell*, 313.

6. *Homicide—Instructions—Evidence—Appeal and Error.*—Where the defendant on trial for a homicide pleads a perfect self-defense upon evidence tending to show that deceased drove into the yard of his home, used abusive language to him and threatened his life, and he fired the deadly shot after the deceased had drawn a pistol on him, a charge of the court based upon the deceased's assaulting the prisoner with his hands, choking him, etc., of which there was no evidence, and upon the theory of a killing without malice, is reversible error to the defendant's prejudice. *S. v. Lee*, 321.

7. *Homicide—Evidence—Identification.*—Upon the question of the identity of the defendant on trial for a homicide as the one who had

HOMICIDE—*Continued.*

committed the crime, the hesitancy of the witness to identify him, followed by his positive and unequivocal testimony that the prisoner was the one, is properly admitted over the defendant's exception. *S. v. Bazemore*, 336.

8. *Homicide—Circumstantial Evidence—Nonsuit.*—A conviction of murder in the first degree may be had upon sufficient circumstantial evidence. *Ibid.*

9. *Homicide—Murder in the First Degree—Presence of Judge—Constitutional Law.*—For a conviction of murder in the first degree under our statutes, C. S., 4200, 4642, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under Constitutional Mandate, Const., Art. I, secs. 13, 17, which right may not be waived. *Ibid.*

10. *Homicide—Murder—Capital Felony—Instructions—Burden of Proof.*—Where the prisoner is on trial for murder in the first degree, burglary and rape, and there is evidence to support a verdict for each of these offenses, an instruction is proper, when construed as a whole, that the burden of proof was on the State to show beyond a reasonable doubt an unlawful killing with malice and with premeditation and deliberation or murder committed in the perpetration, or attempt to perpetrate, other felonies named. *S. v. Walker*, 489.

11. *Homicide—Evidence—Presumptions — Malice — Deadly Weapon—Murder.*—Where there is evidence that the prisoner on trial for a homicide killed the deceased by striking him on the head with an axe, a deadly weapon, the law raises the presumption that the killing was with malice at least sufficient to sustain a verdict of murder in the second degree. *Ibid.*

12. *Homicide—Drunkenness—Intoxication.*—As to the defense for committing a homicide, that it was done under the influence of voluntary intoxication or drunkenness, upon the question of mental incapacity, apply *S. v. Ross, ante*, 25, and other cases cited in that opinion. *Ibid.*

13. *Homicide—Evidence—Verdict.*—Upon the trial for a homicide the jury may accept in part the defendant's evidence tending to establish his innocence and convict him upon other evidence tending to establish his guilt beyond a reasonable doubt, and where the evidence thus introduced is sufficient to convict the defendant of murder, both in the first and second degree, a verdict convicting the defendant of the lesser crime will be sustained. *S. v. Branch*, 621.

14. *Same—Malice—Presumptions.*—Evidence that a prisoner killed the deceased with a pistol shot is sufficient of malice necessary to sustain a verdict of murder in the second degree. *Ibid.*

15. *Homicide—Evidence—Letters—Husband and Wife.*—Letters introduced on the trial for a homicide from the prisoner to his wife, properly identified by a third person and introduced by him without the procurement of the wife, may be received as evidence. *Ibid.*

16. *Homicide—Murder — Evidence — Corpus Delicti—Appeal and Error.*—Where a prisoner upon a trial for a homicide has been convicted of

HOMICIDE—*Continued.*

murder in the first degree under sufficient evidence to sustain the verdict, including that tending to show that he shot the deceased with a pistol, and the deceased threw up his hands and fell with "his brains working out of his head," with reference in the record to the death of the deceased which appears not to have been questioned on the trial as a result from the pistol shot: *Held,* the *corpus delicti* has been made sufficiently on appeal where the point has first been raised in the Supreme Court. *S. v. Johnson,* 701.

17. *Homicide—Murder—Evidence—Alibi—Questions for Jury.*—Where the defense of an alibi is relied on upon the trial for a homicide, conflicting evidence of the State as to whether one of its witnesses could have been correct in his testimony that he had seen the defendant at the place of the crime at its occurrence in connection with the testimony of another of its witnesses tending to show its impossibility, is one for the jury. *Ibid.*

18. *Homicide—Murder—Self-Defense—Evidence — Questions for Jury.*—A homicide is justifiable when the killing is done under a reasonable apprehension under the circumstances that it was necessary to prevent the killing of the accused, or to save himself from great bodily harm, and the question of the reasonableness of such apprehension under the circumstances is one for the jury. *S. v. Holland,* 713.

19. *Same—Evidence—Questions for Jury.*—Upon the question of justifiable homicide, evidence is permissible that tends to show that the defendant was physically greatly inferior to the deceased, knew of his dangerous character or reputation, and of threats made by him against his life, had previously been assaulted without provocation by the deceased, and that at the time of the killing he had retreated before him in fear as he advanced upon him and until prevented by his surroundings. *Ibid.*

20. *Homicide — Evidence — Self-Defense — Collective Facts — Appeal and Error—Prejudice—Reversible Error.*—Where there is evidence tending to show that the accused killed the deceased under a reasonable apprehension of his own death or of receiving great bodily harm from him; that he unexpectedly met the deceased at the door of the room he was leaving, his testimony that he "could tell from the appearance of the deceased, when he came in the cafe door, and jumped at me, that he was mad. I think he was drinking," is competent as a statement of collective simple facts calling for an ordinary and natural inference, which conclusion in itself is a statement of a fact, and its exclusion by the trial judge constitutes prejudicial and reversible error under the evidence of this case. *Ibid.*

21. *Homicide—Murder—Evidence—Res Gestæ—Premeditation.*—Where the evidence on the trial for a homicide tends to show that the prisoner broke into a store with the intent to commit larceny, and being confronted by two men guarding the store, fatally shot one and seriously injured the other, on a trial for murder of the first, evidence is competent as to the shooting and injuring of the other as a part of the *res gestæ,* and also upon the element of premeditation necessary to convict of murder in the first degree. *S. v. Mitchell,* 796.

HUSBAND AND WIFE. See Judgments, 6; Mortgages, 1; Contracts, 8; Criminal Law, 8, 14; Estates, 1; Deeds and Conveyances, 13; Tenants in Common, 1; Homicide, 15; Actions, 10.

1. *Husband and Wife—Alimony—Statutes—Marriage.*—In the wife's application to the courts for alimony without divorce, C. S., 1667, it is not required that the judge find the facts upon which he bases his order allowing it. *Springer v. Springer*, 35.

2. *Husband and Wife—Estates — Entireties—Gift—Parol Trusts—Trusts —Deeds and Conveyances.*—Where a husband pays for lands and has a deed therefor made to the wife, the law presumes that he has made a gift to her of the lands so conveyed. *Carter v. Oxendine*, 478.

3. *Same—Statutes—Separate Examination of Wife—Probate.*—Our Constitution and statute require of a conveyance of lands by the wife, for her protection, that her written consent and privy examination be taken, and a parol trust in lands purchased with her own money, or partly so purchased, cannot be engrafted on a deed, made subsequently, at her request by the seller to her and her husband, or create an estate by entireties so that the estate surviving to the husband will descend to his heirs at law. *Ibid.*

IDENTITY. See Criminal Law, 9.

IDENTIFICATION. See Deeds and Conveyances, 17.

IMPEACHMENT. See Criminal Law, 13, 14.

IMPLIED AUTHORITY. See Insurance, 17.

IMPROVEMENTS. See Municipal Corporations, 3.

INCOME. See Wills, 3.

INDEMNITY. See Attachment, 2; Principal and Surety, 1; Election of Remedies, 1.

INDEMNITY BONDS. See States, 2; Contracts, 11; Debtor and Creditor, 2; Highways, 12.

INDEX BOOK. Records, 1.

INDIANS.

1. *Indian Legislative Committee—Administrative Boards.*—The legislative committee appointed to pass upon the admissibility of persons applying for permission to enter the Indian schools of Robeson County is an administrative board and not a court, and has the power to reinvestigate the matter of qualification of an applicant, and reverse their former conclusion that he was eligible. *In re Smiling*, 448.

INDICTMENT. See Constitutional Law, 7; Criminal Law, 720.

INJUNCTION. See Appeal and Error, 2, 9; Constitutional Law, 1, 5; Estates, 2; Municipal Corporations, 3, 7, 9.

1. *Injunction—Restraining Order—Continuance to Hearing.*—Where the plaintiff in injunction makes it to appear that his remedy at law is inadequate and that he may probably succeed in establishing that he

INJUNCTION—*Continued.*

would otherwise sustain irreparable loss, and the rights of all parties preserved, the restraining order theretofore issued will be continued to the hearing of the case. *Wentz v. Land Co.*, 32.

INQUISITION. See Habeas Corpus, 3.

INSANE PERSONS. See Contracts, 5, 8, 9; Habeas Corpus, 1, 3.

INSANITY. See Contracts, 5, 8, 9; Habeas Corpus, 1, 3.

INSOLVENCY. See Receivers, 1; Banks and Banking, 8.

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INSTRUCTIONS. See Appeal and Error, 12, 15, 22, 28, 29, 30, 33, 34, 35, 36; Evidence, 10, 17, 25; Homicide, 2, 6, 10; Insurance, 5; Negligence, 3, 6; Damages, 1; Criminal Law, 11, 22.

1. *Instructions—Requests for Instructions—Appeal and Error—Objections and Exceptions.*—An instruction that in general terms correctly applies the law of the case arising from the evidence, will not be held for reversible error, it being for the appellee to offer a prayer for special instructions going into the particulars complained of, and to except to the refusal of the court to give it. *Bank v. Rochamora*, 1.

2. *Instructions—Conflict—Appeal and Error.*—Where an instruction by the court to the jury is conflicting upon a material point, a new trial will be granted on appeal. *S. v. Waldroop*, 12.

3. *Instructions—Appeal and Error.*—Where several phases of the charge of the judge to the jury come within a principle broadly applicable to the case, as, in this instance, the burden of proof, it is not error for the judge to omit to charge upon this general rule each time, when he has once correctly and clearly charged thereon. *Pennell v. Brookshire*, 73.

4. *Instructions—Evidence—Appeal and Error.*—Where testimony upon a criminal trial is properly excluded upon motion of the objecting party to strike out, and thereafter in his charge the judge has referred to it as a part of the testimony, the error is prejudicial and a new trial will be granted on appeal. *S. v. Maragousis*, 246.

5. *Instructions—Negligence—Proximate Cause.*—While in an action to recover damages for an injury alleged to have been negligently inflicted, the judge should ordinarily define the meaning of "proximate cause" as applied to the evidence of the case, his omission to do so will not be considered as reversible error to the defendant's prejudice, when he has not done so with reference to the issue of contributory negligence, and the jury could not have misunderstood the principles under the general charge. *Fleming v. Utilities Co.*, 262.

6. *Same—Excerpts from Charge—Considered as a Whole—Appeal and Error.*—Instructions if correct when considered as a whole will not be held as reversible on appeal because of seeming error, when regarded in its disjointed or fragmentary parts. *Ibid.*

7. *Instructions—Determinative Principles of Law—Requests for Special Instructions—Appeal and Error—Statutes.*—Where from the plead-

INSTRUCTIONS—*Continued.*

ings and evidence an issue is raised for the jury to determine whether the holder for value of a mortgage note has elected to sue the original payee instead of the maker and mortgagee, under the provisions of our statute, C. S., 564, it is required of the trial judge that he charge the jury upon the phase of the case, material to the determination of the controversy, upon the principles of law thereto applying, without the necessity of a prayer for special instruction covering them. *Darden v. Baker*, 386.

8. *Instructions—Directing Verdict—Evidence.*—Where only one reasonable inference can be drawn from all the evidence in the case, an instruction directing a verdict accordingly if the jury so find the facts, is proper. *Ins. Co. v. Cates*, 456.

9. *Instructions—Directing Verdict—Evidence—Excess Over Homestead—Execution—Sales—Burden of Proof.*—Where the purchaser of land sold under execution contends that he is the owner by virtue thereof of the *locus in quo* in the present action as the surplus after laying off the homestead of the defendant's predecessor in title, the burden of proof is upon him, and a directed verdict in his favor is properly denied in the trial court, and he must depend upon the strength of his own title and not the weakness of that of the defendant in ejectment. *Carstarphen v. Carstarphen*, 541.

10. *Instructions—Evidence—Directing Verdict.*—Where, by every reasonable intendment, the evidence and admissions on the trial should be resolved in appellee's favor, a directed verdict thereon against the defendant is not erroneous. *Ibid.*

11. *Instructions—Criminal Law—Statutes—Special Requests—Appeal and Error.*—While the judge is required by our statute, C. S., 564, to explain the law to the jury arising from the evidence in the particular case that is essential to constitute a homicide, it is required of the prisoner to offer a request for special instructions as to its application in more specific detail, when the charge is substantially correct. *S. v. Johnson*, 701.

12. *Instructions—Contentions—Appeal and Error.*—Where the trial judge has stated the contentions of the opposing party, the appellant insisting upon a prejudicial error therein must have called it to the attention of the judge at the time to afford him an opportunity for correction, or the matter will not be considered on appeal. *Ibid.*

13. *Instructions—Intimation of Opinion—Improper Remarks—Jury—Appeal and Error—Prejudice—Statutes.*—C. S., 564, prohibiting an expression of opinion by the trial judge upon the weight and credibility of the evidence, applies to such expressions made in the hearing of the jury, and *it is held* reversible error for him, in a criminal action, to direct a judgment of nonsuit in the presence of the jury, as to one of several defendants upon trial of them all for kidnapping, upon the ground that upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense. *S. v. Sullivan*, 754.

14. *Instructions—Weight and Credibility of Evidence—Contentions—Appeal and Error—Harmless Error.*—A recitation of the contentions of the

INSTRUCTIONS—*Continued.*

State upon the trial for murder that the testimony of a witness corroborated the testimony of another witness is not held for reversible error, under the facts of this case, as an expression of opinion of the trial judge upon the weight and credibility of the evidence. C. S., 564. *S. v. Mitchell*, 796.

15. *Instructions—Appeal and Error—Objections and Exceptions—Contentions.*—The practice of the trial judge in stating the contentions of the parties rests by custom and not by statute, and for alleged error therein the appealing party must have excepted at the time affording the judge an opportunity for correction. *Chamberlain v. Dyeing Co.*, 849.

INSURANCE. See Actions, 1; Appeal and Error, 8; Bailment, 1, 4, 6; Principal and Surety, 1; Tender, 1; Judgments, 12; Wills, 9; Evidence, 20; Election of Remedies, 1.

1. *Insurance, Life—Policies—Contracts—Vested Rights.*—Where a life insurance policy is in full force at the time of the death of the insured, and issued in favor of a designated beneficiary by name, such beneficiary having acquired a vested right under the policy contract may recover thereon as against the right of another to whom the policy has on its face been attempted to have been changed, there being no evidence that the policy itself authorized a change of this character to be made, or that the original beneficiary had thereto assented. *Lockhart v. Ins. Co.*, 8.

2. *Same—Change of Beneficiary—Evidence.*—Where a policy of life insurance has matured upon the death of the insured, and on its face the beneficiary appears to have been changed, the interpleader, relying upon this change, has the burden of proof to establish it. *Ibid.*

3. *Same—Burden of Proof.*—Where a life insurance company acknowledges that it is obligated for the payment of its policy of insurance, but that it is claimed by two different persons as beneficiary, and one of them interpleads in the action, and founds her right to recover on the ground that the policy contract had been changed to her as the beneficiary, the burden rests upon her to establish her right. *Ibid.*

4. *Insurance, Life — Convertible Term Policies — Options — Premiums—Medical Examination.*—Where an insurance company has issued a convertible term life insurance policy with privilege of exchange within a specified time, for a certain class of policy (of which it issued two kinds) continuously, and one gives a greater value to the insured than the other upon an increase of premium, without requiring another medical examination, an option as to the kind of these policies is given the insured, and he may elect to take the one of the greater value upon paying the additional premium, without a medical examination. *Rosenberg v. Assurance Society*, 126.

5. *Insurance, Accident — Policies — Contracts—Receipts for Premiums—Instructions—Appeal and Error.*—The printed matter upon the back of a receipt given to the insured under an accident policy as to the value of the policy issued, is no part of the contract and cannot effect an increased liability on the part of the insurer for a loss arising thereunder, and error in admitting it in evidence is cured by an in-

INSURANCE—*Continued.*

struction of the court making the liability of the insurer dependent entirely upon the terms of the policy contract. *Clark v. Ins. Co.*, 166.

6. *Insurance, Accident—Delay by Insurer to Deliver Policy to the Insured—Actions.*—Where a policy of accident insurance has been issued before the accident in suit, and its delivery by error or oversight of the insurer has been delayed beyond that time, and the premiums have been paid, the action thereon may be maintained. *Ibid.*

7. *Insurance, Accident—Stipulations as to Delay in Amputating Foot—Valid Provisions.*—Where among other things in a policy of accident insurance, that to recover for the loss of a foot, it is provided that the foot must have been amputated within thirty days from the date of the accident: *Held*, the stipulation is a valid and enforceable one, whatever the insured's reason for a delay in amputating the foot may have been, when not consented to by the insurer. *Ibid.*

8. *Insurance, Accident—Policies—Contracts—Provisions—Approval of Insurance Commissioner—Evidence.*—The approval of the Insurance Commissioner of a form of accident insurance is weighty evidence of the validity of its provisions, but not controlling upon the courts. C. S., ch. 106, subch. 5, art. 23. *Ibid.*

9. *Insurance, Accident—Policies — Contracts—Provisions—Alternate Liability.*—Where an accident insurance policy creates a liability for loss of time and a foot, but restricts the right of the insured to recover loss on only one of them: *Held*, the provision is valid, and he may not recover for both in his action. *Ibid.*

10. *Insurance, Life—Payment of Premiums—Waiver—Policies—Contracts.* A life insurance company may waive the strict conditions in its policy as to payment of premiums at stated periods, by accepting payment for arrearages, and thus restore the vitality or enforcement of the policy which otherwise would be void. *Arrington v. Ins. Co.*, 344.

11. *Insurance, Fire—Payment of Loss—Subrogation—Actions.*—A fire insurance company which has paid the damages for a fire loss covered by its policy, is subrogated to the rights of the insured to maintain an action against the railroad company for its negligence in setting out the fire which caused the loss. *Ins. Co. v. R. R.*, 404.

12. *Insurance, Fire—Policies—Contracts—Breach of Condition That Invalidates the Policy—Waiver.*—A breach of the condition of a policy of fire insurance, statutory form (C. S., 6437) that the policy is void if the insured has not the sole and unconditional title is valid and enforceable by the company without the necessity of disclaiming liability upon notice or knowledge of its infraction, and inaction on its part in this respect is not a waiver thereof. *Smith v. Ins. Co.*, 446.

13. *Same—Mortgages—Notice to Company.*—Where a policy of fire insurance upon a dwelling contains the condition making the policy void if the ownership of the property is not sole and unconditional, and the property is mortgaged at the time with the loss payable clause incorporated, notice to the agent of a second mortgage on the dwelling given some time after the second mortgage was given, but before the occurrence of the fire occasioning the loss, will not alone render the insurer liable on the policy contract. *Ibid.*

INSURANCE—*Continued.*

14. *Insurance, Fire—Principal and Agent—Conditions—Waiver.*—The rule that the agent of a fire insurance company may waive conditions affecting the validity of a policy generally apply to such conditions existing at the time of the issuance of the policy. *Ibid.*

15. *Insurance, Life—Policies — Applications — Stipulations.*—A stipulation in the application for a policy of life insurance that the policy applied for will only be valid if the application is accepted by the insurer and delivered while the applicant is alive, and the first premium thereon paid, is a reasonable one, and valid. *Turlington v. Ins. Co.*, 481.

16. *Same—Death of Insured Prior to Delivery of Policy.*—When the local agent of a life insurance company has received an application for insurance, stipulating in effect, among other things, that it would not be enforceable unless delivered to the applicant in his life, and when the local agent received the policy applied for, he returned it to the company on account of the death of the applicant, no delivery has been made that would give effect to the proposed policy contract. *Ibid.*

17. *Same—Principal and Agent—Payment of Premium—Implied Authority.*—An undisclosed agreement, made between the agent of one applying for a policy of life insurance and the local agent of the company, that a credit would be given for professional services personally owed by the local agent of the insurer to the agent of the applicant, the latter's son, and which was so given at the time of the application for the policy, covering full payment of the premium, is not binding upon the insurer, unless acquiesced in by it. *Ibid.*

18. *Same—Ratification—Premium Notice.*—Where a local agent of a life insurance company has received a credit on his own personal account for the premium to become due on the insurer's acceptance of an application for life insurance, the fact that the insurer without notice or knowledge of this fact sent the applicant a notice of a second payment to become due if the policy were alive and in force is not a ratification of the unauthorized act of the local agent. *Ibid.*

19. *Insurance, Accident—Policy—Contracts—Sole Cause of Injury—Evidence—Questions for Jury—Nonsuit.*—Where a policy of accident insurance provides that the insurer will not be liable unless the injury resulted directly and exclusively of all other causes from bodily injuries sustained, etc., evidence that the insured had sustained an injury from a gun-shot wound of some twenty years before that had healed, and there was no causal connection between it and the injury complained of, and evidence *per contra*, raises an issue for the jury, and the defendant's motion as of nonsuit should be denied. *Harris v. Ins. Co.*, 485.

INSURANCE, ACCIDENT. See Insurance.

INSURANCE COMMISSIONER. See Insurance, 8.

INSURANCE, LIFE. See Insurance.

INTENT. See Homicide, 4; Wills, 2, 17; Contracts, 11.

INTEREST. See Municipal Corporations, 3; Corporations, 4, 7; Drainage Districts, 11; Judgments, 16.

INTERPLEADER. See Courts, 9.

1. *Interpleader—Attachment—Issues.*—Where the note of a nonresident defendant has been attached by process issuing out of the courts of this State, and claimed by an intervener as a bona fide purchaser for value, without notice, before maturity and prior to the time of the attachment, and the defendant in attachment has paid the money into court to abide its payment between the conflicting claimants: *Held,* the issue raised by the intervener's pleadings is the proper one to be considered, and not that raised in the complaint, to which the defendant named therein has filed no answer. *Sugg v. Engine Co.,* 814.

INTERVENERS. See Sales, 2.

INTOXICATING LIQUOR. See Criminal Law, 12.

1. *Intoxicating Liquor—Possession at Home of Accused—Statutes.*—The mere possession of spirituous liquor in the home for the use of the owner, his family and their guests on the premises in the absence of a count in the indictment charging that it was for prohibited purposes, is not made unlawful by our prohibition statutes. C. S., 3411 *et al. S. v. Mull,* 668.

INTOXICATION. See Homicide, 12.

"ISSUE." See Estates, 3.

ISSUES. See Appeal and Error, 6, 34; Actions, 11; Deeds and Conveyances, 3; Interpleader, 1; Eminent Domain, 3; Evidence, 7; Judgments, 1; Removal of Causes, 2; Arrest and Bail, 2.

1. *Issues — Contributory Negligence — Evidence — Appeal and Error.* — Where the evidence is conflicting as to the contributory negligence of the insured in an action to recover damages sustained in the loss of goods by fire, alleged to have been caused by the defendant's negligence, and the issue properly arises in the case, it is error for the trial judge to refuse an issue thereon to the jury. *Ins. Co. v. R. R.,* 404.

JOINT TORT. See Removal of Causes, 8, 10.

JUDGE. See Homicide, 9; Appeal and Error, 40, 41.

JUDGMENTS. See Appeal and Error, 3, 17, 27, 31, 32, 38, 40; Sales, 3; Claim and Delivery, 1; Constitutional Law, 7; Deeds and Conveyances, 1; Drainage Districts, 3, 5, 9; Clerks of Court, 1; Execution, 1; Municipal Corporations, 1; Election of Remedies, 1; Criminal Law, 17, 21; Arrest and Bail, 3.

1. *Judgment—Estoppel—Parties — Subject-Matter — Issues.*—Estoppel by judgment rests upon the identity of parties, subject-matters and issues between the judgment relied upon and the relief sought in the present action. *McInturff v. Gahagan,* 147.

2. *Same—Wills.*—Where the deceased nonresident payee of a note refers thereto in his will with the provision that the maker "hold what he

JUDGMENTS—*Continued.*

owes until both of our deaths and pay the interest to my wife . . . to support her as long as she lives": *Held*, a judgment in the court of foreign jurisdiction wherein the beneficiaries under the will were not made parties, that the maker keep the note, properly secured, lacks the essential elements of an estoppel in this Court for want of necessary parties, and from the judgment relied on it was impossible on this appeal to sufficiently determine the subject-matter. *Ibid.*

3. *Judgments—Nullity—Courts.*—Where it appears from the record in the case that the judgment is void, it will be considered as a nullity by the court without life or effect given it. *Ellis v. Ellis*, 216.

4. *Judgments—Consent—Contracts—Approval of Court.*—A consent judgment rests by the agreement of the parties upon its subject-matter, and is given the effect of a judgment of the court in accordance with its terms, with the approval of the trial judge. *Ibid.*

5. *Same—Vacated Upon Consent.*—A consent judgment being founded upon the contract of the parties may not be amended or made ineffectual by the court without like assent of the parties. *Ibid.*

6. *Same—Married Women—Husband and Wife—Deeds and Conveyances—Statutes.*—While a consent judgment must be in conformity with C. S., 2515, that transfers the wife's title in her separate realty to her husband, upon her executing and delivering her deed thereto in conformity with the statutory provisions, the husband may claim title under his valid deed. *Ibid.*

7. *Same—Annuities—Estoppel.*—Where by consent judgment a division of lands is made between the husband and wife under which the lands of the wife were charged with the payment of an annuity to the husband, upon the husband's motion to vacate the judgment, the wife insisting upon the validity of the judgment assumes the burden upon the lands conveyed to her, and is bound by the judgment. *Ibid.*

8. *Judgments—Default—Motions to Set Aside—Excusable Neglect—Attorney and Client—Principal and Agent—Statutes.*—Where a nonresident defendant has been properly served with summons under the provisions of C. S., 600, and refers the defense of the action to its nonresident attorneys, and a judgment by default is rendered for the failure of the nonresident attorneys to employ attorneys practicing law in this State, the nonresident attorneys are to be considered *pro hac vice* as agents for the defendant, and their laches are attributable to it upon defendant's motion to set the judgment aside for surprise, mistake or excusable neglect. *Pailin v. Cedar Works*, 256.

9. *Judgments—Railroads — Carriers — War—Execution—Res Judicata.*—The Federal Control Act of 29 August, 1916, does not forbid a judgment being taken against a carrier for injury caused by its negligent act in the operation of its railroad by the Government during war conditions, but only an execution and levy against its property, which cannot take place until after judgment, and this cannot be considered as *res judicata* in the action in which the judgment against the carrier had been rendered, the remedy being under the Federal Statute of 1920. *R. R. v. Story*, 362.

JUDGMENTS—*Continued.*

10. *Judgments—Estoppel—Res Adjudicata—Courts.*—The plea of *res adjudicata* must be raised and insisted upon in the proceedings before a board exercising judicial functions, or it will be deemed to have been waived. *In re Smiling*, 448.

11. *Judgments—Estoppel—Res Adjudicata—Claim and Delivery—Possession—Injury to Property—Actions.*—Where a judgment by default is rendered against the defendant in claim and delivery, without having submitted the issue of damages for the detention or deterioration of the property as prescribed by the statute, and thereafter the defendant has paid the plaintiff the amount of the debt, principal, interest and cost, and obtained the possession of the property, the judgment in claim and delivery is not *res adjudicata* in the defendant's later action against the former plaintiff to recover the damages alleged to have been caused the property by his negligent or wrongful use while in his possession. *Crump v. Love*, 464.

12. *Same—Insurer.*—The plaintiff in possession of property under claim and delivery is practically liable as an insurer under the terms of his bond. *Ibid.*

13. *Judgments—Estoppel—Deeds and Conveyances—Reformation of Instruments—Equity.*—Where a deed to timber standing on land is sought to be reformed for conveying more timber, through the mutual mistake of the parties, than was intended, a judgment that the description was in accordance with the intent of the parties, estops the grantor from again setting up his equity both against his grantee and his purchaser under a deed with the same description of the lands conveyed. *Strickland v. Shearon*, 599.

14. *Judgments — Estoppel — Deeds and Conveyances—Appeal and Error—Parties.*—Where injunctive relief is sought against the cutting and removing of timber growing upon lands upon the ground that more timber had been conveyed by mutual mistake of the parties than was intended, and the plaintiff is estopped by judgment from again setting up his equity, the grantee of the defendant under a deed with the same description of the lands upon which the timber was standing has the title to the timber thus conveyed, though he had not been made a party thereto. *Ibid.*

15. *Judgments—Default and Inquiry—Appeal and Error.*—A judgment by default and inquiry establishes only the cause of action alleged in the complaint, and where the equitable relief of reformation of a deed to standing timber upon lands is therein sought, on the ground of mutual mistake of the parties, and judgment is entered against the plaintiff, the basis upon which he has sought damages for the trespass having failed, an inquiry by the court as to the amount is improvidently entered. *Ibid.*

16. *Judgments—Interest—Verdict—Contracts — Tort—Statutes.*—Where a verdict is given in an action on contract in plaintiff's favor for moneys due by the defendant to his intestate, interest is also given the plaintiff on the amount of the recovery as a matter of law, when not incorporated in the verdict. C. S., 2309. When in tort the matter of interest is awarded or not according as the jury may find. *Thomas v. Watkins*, 630.

JUDGMENTS—*Continued.*

17. *Judgments—Principal and Surety—Appeal and Error.*—The surety on a bond has the right to judgment against the principal thereon as the one primarily liable, and a judgment against him alone in plaintiff's favor is erroneous. *Loan Asso. v. Davis*, 710.

18. *Judgments — Terms — Rendered Outside of Trial County—Consent—Agreement of Parties—Substantial Changes.*—Where the parties to an action have agreed that the trial judge may consider the case and sign judgment beyond the limits of the county wherein the case was tried, and he has requested each of them to forward a judgment in accordance with intimations he has expressed, his signing of a judgment sent him by one of the parties is final and he may not, after forwarding it to the clerk of the court, make substantial corrections differing therefrom without the consent of all the parties litigant. *Bisanar v. Suttlemyre*, 711.

19. *Same—Motions—Rights and Remedies—Appeal and Error—Remand.*—Where by consent of the parties the trial judge has signed a final judgment out of term, and in another county from the place of trial, it is thereafter open to the party thereto objecting by a motion in the cause or other appropriate remedy to protect any legal rights that he may have. *Ibid.*

20. *Judgments—Consent—Contracts—Courts—Marriage—Divorce.*—A consent judgment is an agreement or contract made by the parties, entered with the sanction of the court, and without the consent of the parties to vacate or moderate it, the court is without power to do so. And where it is entered in a suit for divorce brought by the wife in which her husband is required to pay certain sums of money at stated intervals for the support of the wife and the child of the marriage as long as she may remain unmarried, the later absolute divorce granted in her independent action is not a violation of the terms of the consent judgment, and the Superior Court judge has no authority to modify it upon that ground. *Lentz v. Lentz*, 742.

21. *Judgment — Default — Motions — Excusable Neglect—Meritorious Defense.*—The party moving within a year to set aside a judgment taken against him for mistake, inadvertence, surprise, or excusable neglect, C. S., 600, must also make it appear that he has a meritorious defense. *Crye v. Stoltz*, 802.

JUDICIAL NOTICE. See Courts, 3.

JURISDICTION. See Actions, 7; Wills, 16; Courts, 1, 8; Removal of Causes, 2, 5, 10; Attachment, 3; Clerks of Court, 1.

JURY. See Instructions, 13.

JUSTICES OF THE PEACE. See Courts, 8; Evidence, 22.

JUSTIFIABLE HOMICIDE. See Homicide, 1.

KNOWLEDGE. See Bills and Notes, 10; Contracts, 7.

LABOR. See Highways, 12.

LAND DEVELOPMENT. See Deeds and Conveyances, 1, 8.

LANDS. See Actions, 2; Municipal Corporations, 8.

LAWS. See Instructions, 7; Appeal and Error, 44.

LEGISLATIVE COMMITTEE. See Indians, 1.

LEGISLATIVE POWERS. See Constitutional Law, 13; Deeds and Conveyances, 21.

LETTERS. See Evidence, 6, 8, 19, 21; Homicide, 15.

LEVY. See Execution, 1.

LIABILITIES. See Banks and Banking, 1, 9; Insurance, 9; Corporations, 9; Bailment, 6.

LIBEL. See Criminal Law, 7.

LIENS. See Drainage Districts, 1; Execution, 1; Mortgages, 1, 2, 4; Mechanics' Liens, 1; Appeal and Error, 31; Sales, 4; Clerks of Court, 2; Deeds and Conveyances, 20; Evidence, 30; Records, 1.

LIFE ESTATES. See Estates, 6.

LIMITATION. See Education, 1.

LIMITATION OF ACTIONS. See Government, 2; Actions, 10; Criminal Law, 18.

1. *Limitation of Actions—Deeds and Conveyances—Reformation—Equity—Fraud—Mistake—Statutes.*—While a deed reserving a life estate in the grantors may be reformed for fraud, mutual mistake, etc., so as to show that in fact it was a mortgage with the defeasance clause omitted, and permit those claiming title under the mortgagor after his death to have an accounting in proper instances, they must do so within three years from the discovery of the fraud, etc., or when they should reasonably have discovered it, during the continuance of the life estate or thereafter, under the provisions of C. S., 441(9) and 437(4). *Muse v. Hathaway*, 227.

LOANS. See Constitutional Law, 9.

LOCAL PREJUDICE. See Removal of Causes, 11.

LOCATION. See Highways, 1.

MACHINERY. See Highways, 12.

MALICE. See Criminal Law, 10, 15; Homicide, 11, 14; Arrest and Bail, 2, 4.

MALPRACTICE. See Appeal and Error, 43.

MANDAMUS.

1. *Mandamus — Pleadings — Demurrer.*—Mandamus is an extraordinary remedy allowed in civil matters to compel a public officer to perform some legal duty clearly required of him by law, when no other remedy is available, and the complaining party must clearly establish the violation of his right to obtain the relief sought. *Hayes v. Benton*, 379.

MAPS. See Deeds and Conveyances, 1; Highways, 4.

MARKETS. See Health, 1.

MARRIAGE. See Husband and Wife, 1; Judgments, 20.

MARRIED WOMEN. See Judgments, 6.

MASTER AND SERVANT. See Railroads, 1; Removal of Causes, 4, 8; Negligence, 10, 17, 19, 27.

1. *Master and Servant—Employer and Employee—Negligence—Duty of Master — Safe Instrumentalities — Inspection — Evidence—Nonsuit.*—Where there is evidence that a lineman of an electric transmission, etc., company is required in the course of his employment to climb poles erected to support the overhead wires, by the use of steel spurs or "climbers" strapped to his feet which would probably slip on imperfect poles and cause him to fall to the ground to his injury, and the poles had been selected by the defendant or its agents, and under the foreman's requirements the lineman attempted to climb a defective pole, and fell and was fatally injured by reason of an improper pole, under the principle that the master is required by ordinary care to inspect the instrumentalities it provides in such instances, it is sufficient for the determination of the jury upon the issue of the defendant's actionable negligence, and without further evidence the questions of contributory negligence and assumption of risks do not arise. *Burgess v. Power Co.*, 223.

2. *Master and Servant—Fellow-Servant—Negligence in Selecting Servants —Evidence—Wages Paid—Appeal and Error.*—Where the plaintiff, among other things, seeks to recover damages for a personal injury on the ground of the defendant's negligence in not selecting other competent or careful employees which caused the injury in suit, evidence as to the comparative insufficiency of compensation he paid them in comparison with that paid for competent employees, is inadmissible. *Taylor v. Construction Co.*, 775.

3. *Master and Servant—Negligence of Fellow-Servant—Notice Actual or Constructive—Evidence.*—For a master to be held responsible in damages for his negligence in employing incompetent fellow-servants which caused the damages in an action for a personal injury to the plaintiff, an employee engaged within the scope of his employment, the conduct of the fellow-servants or specific negligent acts while engaged in their work is insufficient unless the defendant had actual or constructive notice thereof before the injury occurred, in the absence of other evidence of the master's negligence in employing them. *Ibid.*

4. *Master and Servant—Principal and Agent—Vice-Principal—Employer and Employee—Alter Ego.*—One who is in charge of the men's department in a department store is the vice-principal or *alter ego* of the company operating the store, in his relationship to salesmen and other employees therein at work within the scope of their employment, and who work under his instructions. *Robinson v. Ivey*, 805.

5. *Same — Negligence — Contributory Negligence — Vice-Principal—Alter Ego.*—Where there is evidence tending to show that one employed in a department of a store, under the order of the vice-principal or *alter ego* of the owner, climbs upon the shelves to take samples of men's hats from their boxes and give them to the vice-principal for

MASTER AND SERVANT—*Continued.*

the purpose of checking the stock with a list he has in his office, in returning the hats to the boxes is injured by the shelf on which he was climbing giving way and precipitating him to the floor, to his injury, and from causes that the employee could not reasonably be presumed to have anticipated, and that a step-ladder was available elsewhere in the store, and known to the vice-principal, which he did not supply: *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence in failing in its nondelegable duty to furnish the injured employee a safe place and method or appliance to do the work thus required of him. *Ibid.*

6. *Master and Servant—Fellow-Servants—Railroads—Statutes.*—The law relating to the doctrine of fellow-servants has been only modified in regard to its application to those employed by railroad companies operating in this State. C. S., 3465. *Ibid.*

MATERIALMEN. See Highways, 8, 12; Contracts, 12.

MECHANICS' LIENS.

1. *Mechanics' Liens—Liens—Municipal Corporations—Contracts—Principal and Agent—Evidence.*—A material furnisher to a subcontractor, who has used the material in the construction of a public school building, can acquire no lien on the building, and where the contractor has been found by the verdict of the jury not to be liable, the materialman cannot recover the amount withheld by the school board in settlement with the contractor on account of the pendency of the litigation, on the ground that the material was so used. *Mfg. Co. v. Bray*, 350.

MEETINGS. See Corporations, 1, 4.

MENTAL CAPACITY. See Contracts, 8.

MERITORIOUS DEFENSE. See Judgments, 21.

MINORS. See Damages, 1.

MISDEMEANOR. See Convicts, 1; Criminal Law, 3; Escape, 1, 3.

MISJOINDER. See Actions, 1.

MISREPRESENTATION. See Appeal and Error, 8; Banks and Banking. 3.

MISTAKE. See Limitation of Actions, 1.

MONOPOLIES. See Municipal Corporations, 4.

MORTGAGES. See Constitutional Law, 4; Records, 1; Sales, 1, 2, 4; Trusts, 1; Deeds and Conveyances, 9, 12, 20; Insurance, 13; Corporations, 11.

1. *Mortgages—Purchase-Money—Liens—Husband and Wife—Estates—Entireties—Husband's Conveyance—Deeds and Conveyances.*—Where the husband alone signs a purchase-money note and mortgage, the latter duly registered, on lands conveyed to him and his wife by entireties, it is prior in lien to that of a later registered mortgage on the same lands made by them with another for borrowed money. *Trust Co. v. Broughton*, 320.

MORTGAGES—*Continued.*

2. *Mortgages—Liens—Foreclosure—Sales.*—The holder of a second mortgage lien on lands is entitled to have the same foreclosed upon or after maturity of the note it secures, subject to the first mortgage. *Ibid.*

3. *Mortgages—Deeds and Conveyances—Assumption of Mortgage Debt—Principal and Surety.*—Where lands are encumbered with a mortgage and the mortgagor conveys them to a third person, who assumes the outstanding mortgage as between the mortgagor and the purchaser, the mortgagor occupies the place of surety against whom the mortgagee may proceed to collect the deficiency of the price the land had brought at the foreclosure sale. *Wadford v. Gillette,* 413.

4. *Mortgages — Cancellation—Forgery—Registration—Liens.*—As against the mortgagee of a third mortgage given on the same lands to secure borrowed money, the wrongful cancellation by a forged entry on the margin in the registration book is a nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been canceled of record. C. S., 2594(2). *Swindell v. Stephens,* 474.

5. *Mortgages—Foreclosure—Sales—Trusts—Courts—Contracts.*—While ordinarily a mortgagee may either foreclose the mortgage in conformity with its terms or apply to the court for foreclosure, the latter course is not available if contrary to a valid stipulation clearly expressed in the instrument. *Jones v. R. R.,* 590.

6. *Mortgages—Deeds in Trust—Trusts—Negligence of Trustee—Damages.* The trustee, in foreclosing a deed of trust given to secure notes for borrowed money, as agent for the debtor and creditor, is charged with the duty of fidelity and impartiality to each, and is required by law to exercise good faith and every requisite degree of diligence in making the advertisement and giving notice of sale, and it is incumbent on him to make every reasonable effort to ascertain the mortgage indebtedness when the instrument secures notes in series, and if through haste, imprudence or want of diligence his conduct has caused the advance of the interest of one of the parties to the injury of another, he is personally liable therefor to the latter. *Davenport v. Vaughn,* 646.

7. *Same—Forged Instruments—Statutes—Negligence.*—Where the foreclosure of a deed in trust securing notes in series has been advertised and sale made without the knowledge of the trustee, and he has refused to execute the deed to the purchaser at the foreclosure sale when called upon to do so because of an outstanding note in the series remaining unpaid and unaccounted for in the hands of a holder for value, he is not justified in accepting from the purchaser a note forged by him and executing the deed (C. S., 3003), without further inquiry, and such purchaser may recover from him to the extent of his loss; and the negligence, if any, of such holder in not notifying him that his note had not been paid, will not affect the result. *Ibid.*

8. *Mortgages — Title — Timber — Deeds and Conveyances—Extension of Period for Cutting and Removing Timber—Consideration—Payment—Tender.*—A mortgage given on timber growing on lands conveys the title only to the extent of securing the note given to the mortgagee for the payment of the money borrowed thereunder, and where the

MORTGAGES—*Continued.*

timber deed provides for an extension period for the cutting and removing of the trees upon the grantee's exercising his option and paying the consideration before the termination of the first or succeeding periods, a payment or proper tender to the grantor or his successors and assigns in conformity with the provisions of the instrument secures to the grantee or those thus rightly claiming under him the continued right to cut and remove the timber for the stated period. *Bank v. Lumber Co.*, 757.

MORTUARY TABLES. See Damages, 3.

MOTIONS. See Actions, 7; Appeal and Error, 5, 11, 16, 24; Claim and Delivery, 1; Criminal Law, 1; Drainage Districts, 3; Evidence, 2, 29; Judgments, 8, 19, 21; Removal of Causes, 9.

MOTIVE. See Removal of Causes, 7.

MUNICIPAL CORPORATIONS. See Dedication, 1; Health, 1; Mechanics' Liens, 1.

1. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Damage to Property Owners—Special Benefits—Offsets—Judgments—Appeal and Error.*—When the statute so provides, the owner of lands upon a street widened by a city may have his damages by reason thereof offset by the special benefits he will receive to the extent of such damages only, and where the verdict finds that the value of the special benefits exceeded the owner's damages, it is error to render judgment against the owner for the excess. *Goode v. Asheville*, 134.

2. *Same—Statutes—Constitutional Law.*—A statute or legislative charter is valid that provides that a city in widening its streets may have the damages sustained by the owner of lands abutting thereon diminished by the special benefits he may receive from the improvements so made, to be assessed by subagencies of the city, etc., with right of appeal to the courts. *Ibid.*

3. *Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Interest—Injunction—Damages—Statutes.*—Where the statute provides that interest on the amount of assessments made by the municipality against lands of owners abutting a street improved shall bear interest at a specified rate from the date of final findings by the board of aldermen, and the pending proceedings have been stopped by injunction of one of such landowners, the interest will begin to run from the date of the final findings of the board, when sustained by the court, the damages caused by the injunctive delay being otherwise provided for by C. S., 854. *R. R. v. Sanford*, 340.

4. *Municipal Corporations—Cities and Towns—Fire Districts—Ordinances—Discrimination—Constitutional Law—Monopolies.*—Ordinances for the erection and maintenance of filling stations within a prescribed fire limit of a town must be of uniform application and indiscriminatory, and where there are several such stations conducting business within such fire limits, an ordinance prohibiting the erecting of another filling station of the same kind as existing therein is void, as tending to create a monopoly forbidden by our State Constitution, Art. I, sec. 31; Const. 1776, Declaration of Rights, sec. 23. *Clinton v. Oil Co.*, 432.

MUNICIPAL CORPORATIONS—*Continued.*

5. *Municipal Corporations—Cities and Towns—Negligence—Streets and Sidewalks — Defects—Supervision and Inspection—Damages.*—Cities are held to the requirement of reasonably safeguarding their streets by proper signals or warnings of dangerous places therein, including defective bridges, and are liable in damages when they have had sufficient knowledge or implied notice in the exercise of reasonable supervision and inspection in which to have made the necessary repairs. *Michaux v. Rocky Mount*, 550.

6. *Same—Highway Commission—Negligence—Damages—Interpretation of Statutes.*—Where, under legislative authority, a city has extended its limits so as to include the part of a public highway entering therein, and by its acts has accepted the highway, it thereby becomes responsible for its upkeep as a part of its streets, under the principle requiring it to keep it in a reasonably safe condition, and another statute giving its maintenance to a highway commission, drawing on separate funds for its cost, will not be construed to be in conflict therewith, when such interpretation is in accord with the intent of the statute under proper construction; or to relieve the city from the consequence of its negligence in failing to safeguard a dangerous place, or open space in a bridge thereon, which proximately causes the injury in suit. *Ibid.*

7. *Municipal Corporations—Cities and Towns—Cemeteries—Deeds and Conveyances—Statutes—Equity—Injunction.*—Where the proper authorities of a city have purchased lands for a Negro cemetery in excess of the fifty acres allowed by C. S., 2623, in good faith, to meet a necessary need therefor, and at a reasonable price, and have paid therefor and accepted a deed from the owners, injunctive relief at the suit of the taxpayers will be denied. *Harrison v. New Bern*, 555.

8. *Same—Suits—Taxpayers—Excess of Lands for Cemetery Purposes—Procedure.*—Where the proper authorities of a city have, in good faith and at a fair price, purchased an acreage of lands in excess of that allowed by C. S., 2623, have paid the purchase price and received the deed, in a suit to enjoin the transaction brought by the taxpayers: *Held*, the relief sought to declare the transaction void and to place the parties *in statu quo* will be denied, and a judgment requiring the city, within a stated time, either to sell the excess or to use it for proper city purposes, etc., retaining the cause for further orders, is proper. *Ibid.*

9. *Municipal Corporations—Cities and Towns—Statutes—Budget—Cemeteries—Actions—Injunction—Taxpayers.*—The failure of the board of aldermen of a city to make provision in their budget for moneys for the purchase of a city cemetery gives the taxpayers no right to injunctive relief after the transaction has been closed, the remedy being by direct action by the State as to the right of the municipality to hold the title thus vested in it. *Ibid.*

10. *Municipal Corporations—Cities and Towns—Government—Negligence.*—Where a city has control of the planning of the tracks of a street car system upon its streets, in so acting it exercises a sound discretionary power under the principles of government, and is not liable therein for an injury caused to one by the improvident placing of a line of street car tracks nearer than was safe for the passing of motor and other

MUNICIPAL CORPORATIONS—*Continued.*

vehicles upon the street. Upon this appeal from overruling the defendants' demurrer it is assumed that the city acted under a legislative power and had properly adopted a plan for placing the tracks of its codefendant upon its streets. *Martin v. Greensboro*, 573.

11. *Same—Pleadings—Demurrer.*—Where the complaint alleges damages against a city only for its failure to properly exercise a discretionary governmental power, a demurrer is good. *Ibid.*

12. *Same—Statutes.*—The right of a city to plan the laying out and maintenance on its streets of the tracks of a street railway corporation is derived from statute or special charters. *Ibid.*

MURDER. See Homicide, 3, 4, 5, 9, 10, 11, 16, 17, 18, 21; Estates, 1.

NECESSARIES. See Highways, 9, 12.

NEGLIGENCE. See Bailment, 2; Release, 1; Evidence, 14, 17, 32; Actions, 12; Instructions, 5; Master and Servant, 1, 2, 3, 5; Principal and Surety, 1; Railroads, 1; Removal of Causes, 5; Mortgages, 6, 7; Damages, 1, 3; Appeal and Error, 43; Pleadings, 4; Municipal Corporations, 5, 6, 10.

1. *Negligence — Street Railways — Collisions—Automobiles.*—An electric street railway company, through its employees on a car operating upon its tracks upon the streets of a city is held to the exercise of due care under the circumstances in avoiding a collision with an automobile crossing its tracks in front of the car, and where the evidence is conflicting as to whether the driver of the automobile reasonably thought that the defendant's car had about stopped at the wrong place to let passengers off, and suddenly and without warning started ahead, and thereby caused the collision, which would not have occurred had the defendant's motorman kept a lookout in front of him, and exercised due care, defendant's request for a directed verdict in its favor is properly refused. *Fleming v. Utilities Co.*, 262.

2. *Negligence — Automobiles — Statutes—Speed Limits—Accident—Proximate Cause—Concurring Cause—Evidence—Questions for Jury.*—While exceeding the speed limit in driving an automobile upon the highway is negligence *per se*, it must be the proximate concurring cause of an injury alleged to have been negligently inflicted to render the owner liable in damages to a guest in his car, and under conflicting evidence as to whether the injury solely resulted from an unforeseeable or unavoidable accident, the question is one for the jury under proper instructions from the court. *Luttrell v. Hardin*, 266.

3. *Negligence—Railroads—Evidence—Duty of Deceased to Avoid Injury—Duty of Engineer—Instructions—Appeal and Error.*—In an action to recover damages of a railroad company for the negligent killing of the deceased and his cow, it is reversible error for the judge to charge the jury upon the evidence that if the deceased was driving his cow in front of the defendant's running train, the defendant's engineer would be justified in assuming that the testate would drive the cow off the track if he was apparently in full charge and possession of his faculties, and he would not be required to stop the train or slacken its speed, as this instruction omits the duty of the engineer to exercise, under the circumstances, ordinary care to have avoided the injury. *Hart v. R. R.*, 317.

NEGLIGENCE—*Continued.*

4. *Negligence — Automobiles — Highways—Violation of Statutes—Causal Connection—Negligence Per Se.*—While it may be negligence *per se* to drive an auto-vehicle on the wrong side of a public highway, and at a speed prohibited by statute (Public Laws 1924, Extra Session, ch. 61, sec. a), the negligence, to be actionable, must have a causal connection with the injury inflicted. *Gillis v. Transit Corporation,* 346.

5. *Same—Accident—Defense—Proximate Cause.*—Where a defense in an action to recover damages for the defendant's negligence is that the injury in suit was attributable to an accident, any negligence on the part of the defendant which was the proximate cause of the injury, will overthrow the defense set up. *Ibid.*

6. *Negligence—Automobiles—Statutes—Rules of the Road—Instructions—Substantial Compliance—Appeal and Error.*—An instruction as to the requirements of motor vehicles passing to the right of others met upon the public highways need not be in the exact language of our statute, Public-Local Laws of 1924, Extra Session, ch. 61, sec. a, if when considered in connection with allegations of the complaint and evidence it is in substantial compliance therewith. *Ibid.*

7. *Negligence—Electricity—Dangerous Instrumentalities.*—Those who furnish electric light and power are held to a high degree of care, commensurate with the dangerous character of the instrumentality in the erection and inspection of the poles and wires carrying a deadly current of electricity, which they transmit and furnish to the public for compensation. *Ellis v. Power Co.,* 357.

8. *Negligence—Automobiles—Highways—Intersecting By-ways—Collisions—Consequent Damages—Proximate Cause.*—In approaching a highway from a yard, the driver of an automobile must have his car under control, and not exceed a speed of ten miles an hour, and also give timely signals of its approach (C. S., 2616), and evidence of his failure to do so causing an accident to another car being properly driven on the highway is sufficient of actionable negligence to take the case to the jury; and the fact that this negligence did not actually result in a collision of the two cars, but proximately caused the injury in the reasonable effort of the driver of the plaintiff's car to avoid it, does not vary the application of the rule. *Fowler v. Underwood,* 402.

9. *Negligence—Accident.*—*Held,* under the facts of this case, the injury for which damages are sought arose solely from an accident, and not through defendant's negligence. *Carawan v. Meadows Co.,* 436.

10. *Negligence—Master and Servant—Evidence—Safe Place to Work.*—Evidence tending to show that plaintiff was employed to carry sacks of cement from one to the other side of a part of a highway left open for passing vehicles, and was struck in so doing by an automobile, is insufficient upon the issue of defendant's actionable negligence in failing to furnish him a safe place to work. *Madden v. Mulligan Co.,* 438.

11. *Negligence—Automobiles—Third Persons—Railroads—Crossings—Collisions.*—Evidence that plaintiff's intestate was riding on the running board of an auto-truck with the implied permission of the driver, who was in full control of its operation, does not tend to establish the

NEGLIGENCE—*Continued.*

responsibility of the intestate for the negligence of the driver in crossing a railroad track, and the killing of the intestate in consequence of a collision of the truck with the defendant railroad company's train. *Odom v. R. R.*, 442.

12. *Same—Imminent Peril—Place of Safety—Contributory Negligence—Questions of Law—Courts.*—The improvident act of one placed in imminent peril of his life by the negligent act of another, under circumstances requiring quick decision for the preservation of his life, does not alone bar his right of action upon the issue of contributory negligence, when the intestate, by a fortunate circumstance could have remained in a place of safety. *Ibid.*

13. *Same—Evidence—Questions for Jury.*—The plaintiff's intestate, by implied invitation of the driver of an auto-truck, was riding on the running-board of the truck when it crossed defendant's railroad track, where it was struck by the defendant's passing train after its flagman or a member of its crew had signalled the driver of the truck to cross, which the truck safely did, but the intestate, in imminent peril of his life, jumped from the truck and was killed by the train: *Held*, the issue of contributory negligence should have been submitted to the jury. *Ibid.*

14. *Negligence—Punitive Damages.*—In order to award punitive damages in a civil action for a personal injury inflicted on the plaintiff, it must be made to appear by the evidence that the act complained of was maliciously done, in addition to the negligence upon which compensatory damages may be given by the jury, or in disregard to the criminal law, or aggravated by the indifference of the defendant to the safety of the plaintiff under the circumstances wherein the negligent act had been committed. *Tripp v. Tobacco Co.*, 614.

15. *Same—Questions of Law.*—The question as to whether there is any evidence sufficient to entitle the plaintiff to recover punitive damages of the defendant under the facts of a particular case, wherein compensatory damages are recoverable for the defendant's negligent act in the infliction of a personal injury, is one of law for the judge to decide. *Ibid.*

16. *Same—Verdict—Appeal and Error.*—Where the night watchman of a corporation, within the scope of his duties, shoots one apparently a trespasser on the defendant's premises at night for an unlawful purpose, and all the evidence tends to show that the watchman did so by a reasonable mistake on his part, the facts are insufficient to submit an issue as to punitive damages to the jury, and the verdict awarding them will be stricken out on appeal. *Ibid.*

17. *Negligence—Master and Servant—Safe Place to Work—Nondelegable Duty—Fellow-Servant.*—It is the nondelegable duty of an employer to furnish its employee a safe place to work within the scope of his duties, and upon its failure to have done so, it may not escape liability to its employee for an injury directly and proximately caused by its negligence upon the ground that the place was unsafe owing to the negligence of a fellow-servant, when the injured employee, the plaintiff in the action, was without contributory fault. *Butler v. Fertilizer Works*, 632.

NEGLIGENCE—*Continued.*

18. *Same—Evidence—Consideration.*—Where there is evidence tending to show that the defendant obtained of its employee, injured by its negligence, a release from liability by fraudulent representations of its agent, evidence of the gross inadequacy of the consideration is properly admitted to the jury to be considered by them in determining the question of fraud. *Ibid.*

19. *Negligence — Master and Servant—Release—Contracts—Fraud—Questions for Jury—Nonsuit.*—Where there is evidence tending to show that an employee's serious injury was proximately caused by the defendant employer's negligence, and that the agent of the defendant called on plaintiff at a hospital in which he had been placed for medical treatment, and in the absence of his wife and other near relatives, induced the plaintiff to sign a release without reading it to him by fraudulent representations as to its extent and scope, and under circumstances that showed that the plaintiff was not in physical or mental condition to understand its contents: *Held,* sufficient to take the case to the jury upon the question of whether the release so signed barred the plaintiff of his recovery. *Ibid.*

20. *Same—Evidence—Consideration.*—Where there is evidence tending to show that the defendant obtained of its employee, injured by its negligence, a release from liability by fraudulent representations of its agent, evidence of the gross inadequacy of the consideration is properly admitted to the jury to be considered by them in determining the question of fraud. *Ibid.*

21. *Same—Burden of Proof.*—Where the defendant has set up a release as a bar to plaintiff's recovery, the burden of proof is on the plaintiff to show that it was fraudulently obtained from him by the defendant's agent, when this defense is set up and relied on by him. *Ibid.*

22. *Negligence—Evidence—Subsequent Changes Made at Place—Appeal and Error.*—Where the condition of a railroad track in an action against the company to recover damages for an alleged negligent injury is a material element of the negligence relied on by the plaintiff, evidence is incompetent upon that issue alone, which tends to show that soon after the occurrence complained of the defendant caused the place to be fixed so as to avoid like consequences in the future. *Shelton v. R. R.*, 670.

23. *Same—Independent Changes.*—Where the evidence of subsequent repair of conditions as showing negligence of defendant is relied on, if competent it must be shown by the plaintiff to have been made by the defendant and not by an independent agency for its own purposes. *Ibid.*

24. *Negligence—Railroads—Crossing—Watchmen—Warnings—Contributory Negligence—Evidence—Questions for Jury—Nonsuit.*—Where a railroad company has for some time kept a watchman to warn travelers of danger from crossing its tracks at a public street or highway, and this is known to the plaintiff, who was injured by a rapidly moving train while attempting to cross in an automobile on a dark, rainy day with the isinglass curtains up, the absence of the watchman and the consequent failure to give warning is an implied invitation to the traveler to cross, which may be considered by the jury upon the ques-

NEGLIGENCE—*Continued.*

tion of whether the person thus crossing the track had exercised ordinary care under the circumstances, or had by failing to use such care contributed to his own injury, and the defendant's motion as of nonsuit upon the evidence is properly denied. C. S., 567. *Barber v. R. R.*, 691.

25. *Same—Stopping Before Crossing Railroad Track.*—Whether one driving an automobile across a railroad track at a public crossing negligently contributes to his own injury by failing to come to a complete stop before attempting to do so, depends upon whether under the circumstances he should have stopped in the exercise of ordinary care for his own safety. *Ibid.*

26. *Negligence—Evidence—Attention to Injured Persons.*—Evidence that the defendant in an action to recover damages for an alleged negligent injury to the plaintiff, carried him to a hospital and furnished him with medical care, is inadmissible upon the issue of negligence. *Ibid.*

27. *Negligence—Evidence—Master and Servant—Safe Place to Work—Nonsuit.*—Evidence in this case *held* sufficient to take the case to the jury upon the question as to whether the defendant had failed in its duty to furnish, in the exercise of ordinary care, its employee a safe place to work, and defendant's motion to nonsuit was properly denied in the absence of evidence tending to show contributory negligence, etc. *Jenkins v. Lumber Co.*, 856.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 4, 6, 7, 8, 9; Evidence, 9, 30; Actions, 8; Contracts, 9; Banks and Banking, 8.

NEWLY DISCOVERED EVIDENCE. See Evidence, 31.

NEW TRIALS. See Appeal and Error, 19, 28; Criminal Law, 8, 22; Banks and Banking, 7; Evidence, 31.

NONDELEGABLE DUTY. See Negligence, 17.

NONRESIDENCE. See Courts, 8.

NONSUIT. See Actions, 5; Evidence, 14, 16, 17, 20, 26, 27; Limitation of Actions, 1; Pleadings, 3; Homicide, 8; Criminal Law, 9; Insurance, 19; Highways, 11; Negligence, 18, 19, 24; Contracts, 15.

NOTICE. See Evidence, 9; Bills and Notes, 9; Insurance, 13, 18; Banks and Banking, 9, 10; Master and Servant, 3.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 6, 10, 29, 34, 37; Arbitration and Award, 3; Evidence, 2, 24; Instructions, 1, 15.

OFFICERS. See Banks and Banking, 2; Corporation, 4, 7, 12; Rewards, 1.

1. *Officers—Counties—Register of Deeds—Principal and Surety—Defalcation—Terms of Office—Application of Payment.*—Where the register of deeds succeeds himself in office, and has given a bond indemnifying the county against loss for each of these terms with different sureties, and has defaulted in the payment of fees he has collected for the county during each term of office, the respective surety companies are liable only to the extent of the defalcation covered by the term in

OFFICERS—*Continued.*

which it occurred, and without the consent or knowledge of the surety for the second term, the principal has no power to direct *pro tanto* the application of a payment he has made, collected during his second term of office, on the amount of his defalcation during his first term of office. *S. v. Adams*, 729.

2. *Same—County Treasurer.*—Where a county treasurer is directed by statute to check monthly upon the receipts of county funds paid to the register of deeds for fees received by him, and has failed in this duty for a long period of time, and thereby has given opportunity to the register of deeds to default in his payment to the county, the surety on the bond of the county treasurer conditioned upon his faithful performance of this duty is liable to the county for any loss thus sustained. *Ibid.*

3. *Same—Equity—Subrogation.*—Where a county treasurer has neglected to check upon the register of deeds as to fees received by him as such officer, in an action by the county against the register of deeds and the sureties on his bond, and also against the county treasurer and the surety on his bond, the equitable principle of subrogation in favor of the surety on the latter's bond has no application. *Ibid.*

OFFSET. See Municipal Corporations, 1; Banks and Banking, 8; Bills and Notes, 11.

OPINIONS. See Constitutional Law, 2; Appeal and Error, 17, 31; Instructions, 13.

OPTION. See Arbitration, 2; Insurance, 4.

ORDER, NOTIFY. See Sales, 5.

ORDERS. See Appeal and Error, 16; Habeas Corpus, 3.

ORDINANCES. See Health, 1; Municipal Corporations, 4.

PARENT AND CHILD. See Deeds and Conveyances, 4; Damages, 1; Wills, 9, 10.

1. *Parent and Child—Adopted Child—Statutes—Descent and Distribution—Wills—Testacy.*—Where the petitioner adopts a child for life, C. S., 185, the latter is not entitled to share in the personal estate by virtue of the adoption alone, when the adopting parent has died testate. *Sorrell v. Sorrell*, 439.

2. *Parent and Child—Wills—After-born Child—Statutes.*—The beneficent provisions of C. S., 4169, providing for a child born after the execution of the will of the father, when the father has failed to do so, is not affected by the presumptive knowledge of the father, from the condition of his wife, that at the time he made the will he must have anticipated the birth, but upon the fact that the child was born thereafter. *Christian v. Carter*, 537.

PARKS. See Dedication, 1; Deeds and Conveyances, 1.

PAROL. See Trusts, 1.

PAROL EVIDENCE. See Contracts, 1; Corporations, 3, 6; Bills and Notes, 9.

PAROL TRUSTS. See Husband and Wife, 2.

PARTIES. See Actions, 3, 8, 9, 10, 11; Arbitration and Award, 2; Bills and Notes, 1, 8; Courts, 2; Judgments, 1, 14, 18; Removal of Causes, 5; Pleadings, 5; Usury, 1; Contracts, 11; Trials, 1; Clerks of Court, 2.

PARTITION. See Appeal and Error, 14.

PARTNERSHIP. See Arrest and Bail, 1; Contracts, 2; Receivers, 1.

PAYMENT. See Bills and Notes, 7, 8; Tender, 1; Insurance, 10, 11, 17; Usury, 3; Debtor and Creditor, 1; Evidence, 20; Banks and Banking, 4, 5; Officers, 1; Mortgages, 8.

PETITION. See Removal of Causes, 6; Drainage Districts, 6.

PHYSICIANS AND SURGEONS. See Principal and Agent, 1; Appeal and Error, 43.

PLEA. See Criminal Law, 19.

PLEADINGS. See Actions, 1, 3, 5, 8; Arbitration and Award, 3; Claim and Delivery, 1; Removal of Causes, 5; Appeal and Error, 19, 39; Wills, 14; Municipal Corporations, 11; Contracts, 15; Mandamus, 1.

1. *Pleadings—Discretion of Court—Amendments—Appeal and Error.*—The trial court in its discretion may allow the respondent to a petition to condemn his lands to be taken by a *quasi*-public corporation unless it is made to appear on appeal that this discretion has been abused. *Power Co. v. Hayes*, 104.

2. *Pleadings—Demurrer.*—Upon demurrer to the complaint only the facts alleged in the pleadings will be considered by the courts, and the additional allegations of the defendant in his demurrer will be considered as a speaking demurrer. C. S., 511(5). *S. v. McCanless*, 200.

3. *Pleadings—Nonsuit—Amendments.*—The trial judge may in his discretion allow an amendment to pleadings after a judgment as of nonsuit has been entered as to one of the defendants, when a good cause of action is alleged as to the other, C. S., 547, and likewise the Supreme Court on appeal, under C. S., 1414. *Spinks v. Ferebee, Mayor*, 274.

4. *Pleadings—Negligence.*—Where damages are sought in an action on the ground of defendant's negligence, the fact of negligence must be so specifically alleged as to afford the defendant opportunity to reply, and a broad allegation of negligence is insufficient. *Gillis v. Transit Corporation*, 346.

5. *Pleadings — Demurrer — Actions— Dismissal—Counterclaim—Parties—Causes of Action—Statutes.*—In an action by a holder in due course for value to recover against the maker of the instrument when upon defendant's motion the officers and directors of the payee bank and its receiver have been made parties, the defendants' cross-action alleging payment to the payee bank and fraud of its officers and directors, and demanding judgment over against them if plaintiff recover judgment in the action as at first constituted, is a misjoinder of both parties and causes of action, the alleged action against the receiver sounding in contract and the other in tort, and the cross-action will be dismissed. C. S., 507. *Bank v. Angelo*, 576.

PLEADINGS—*Continued.*

6. *Same—Separable Controversies—Statutes.*—Where, from the complaint, it appears that there has been a misjoinder of both parties and causes of action, C. S., 516, wherein a separation or division of the causes of action will be ordered by the court, does not apply. *Ibid.*

7. *Pleadings — Prayer for Relief—Courts—Interpretation—Forclosure.*— The prayer of the complaint for the relief sought is not determinative thereof, but ultimately dependent upon the legal effect of the matters alleged in the pleadings to be interpreted by the court. *Jones v. R. R.*, 590.

POLICE POWERS. See Courts, 3.

POLICY. See Insurance, 1, 4, 5, 6, 8, 9, 10, 12, 15, 16, 19; Statutes, 3; Election of Remedies, 1; Bailment, 6.

POSSESSION. See Judgments, 11; Intoxicating Liquor, 1.

POWERS. See Highways, 1, 2; Wills, 3, 13, 19; States, 1.

PRACTICE. See Courts, 6.

PRAYER FOR RELIEF. See Pleadings, 7.

PREJUDICE. See Appeal and Error, 14, 26; Evidence, 13; Homicide, 20; Instructions, 13.

PREMEDITATION. See Homicide, 21.

PREMIUMS. See Insurance, 4, 5, 10, 17, 18; Evidence, 20.

PRESUMPTIONS. See Appeal and Error, 12, 15, 20, 21, 25, 33, 35; Criminal Law, 1; Evidence, 4; Statutes, 1; Homicide, 11, 14.

PRIMARY AND SECONDARY EVIDENCE. See Evidence, 8.

PRINCIPAL AND AGENT. See Actions, 4; Bills and Notes, 2; Master and Servant, 4; Contracts, 2, 10; Criminal Law, 4; Judgments, 8; Deeds and Conveyances, 7; Banks and Banking, 11; Evidence, 15; Insurance, 14, 17; Mechanics' Liens, 1; Receivers, 2.

1. *Principal and Agent—Railroads—Claim Agent—Physicians and Surgeons—Scope of Agent's Authority—Evidence.*—A principal is not only bound by the acts of his agent within his express authority, but also within his implied authority, which latter may be evidenced by the acts of the particular agent in the same or similar circumstances. And where a physician or surgeon has previously been called in by the claim agent of a railroad company to operate or render professional services to persons injured by its train, and the company has paid the physician for them, it may not thereafter deny liability for similar services so rendered, without having given in some recognized way notice of the lack of its agent's authority. *Saliba v. R. R.*, 392.

PRINCIPAL AND SURETY. See Highways, 8, 12; Bastards, 1; Judgments, 17; Mortgages, 3; States, 2; Debtor and Creditor, 2; Election of Remedies, 1; Appeal and Error, 38; Officers, 1; Contracts, 12.

1. *Principal and Surety—Negligence—Insurance—Indemnity—Loss—Contracts—Actions.*—The surety on an indemnity bond against loss result-

PRINCIPAL AND SURETY—*Continued.*

ing to another from the negligence of the owner in driving his automobile, is not liable unless a loss has been sustained before action brought, when this liability is excluded by the terms of the bond. *Luttrell v. Hardin*, 266.

2. *Same—Evidence.*—Where a surety is on a bond of the owner of an automobile indemnifying him against loss for his negligence, evidence of the suretyship is inadmissible in an action brought against the owner, when under the terms of the bond the surety cannot be held liable in the action until the owner has sustained a loss. *Ibid.*

PRINTING. See Appeal and Error, 42.

PRIORITY. See States, 1; Banks and Banking, 4, 5; Records, 1.

PROBATE. See Husband and Wife, 3; Deeds and Conveyances, 20.

PROCEDURE. See Drainage Districts, 2; Municipal Corporations, 8.

PROCESS. See Courts, 8.

PROOF. See Evidence, 8.

PROPERTY. See Attachment, 1; Municipal Corporations, 1; Judgments, 11; Constitutional Law, 15.

PROSTITUTION. See Criminal Law, 8, 17.

PROVISIONS. See Insurance, 1, 2, 3.

PROXIMATE CAUSE. See Instructions, 5; Negligence, 2, 5, 8.

PUBLICATION. See Courts, 9.

PUBLIC DEBT. See Constitutional Law, 9.

PUNISHMENT. See Constitutional Law, 3, 6; Statutes, 3.

PUNITIVE DAMAGES. See Negligence, 14.

PURCHASER. See Banks and Banking, 6.

QUALIFICATION. See Evidence, 11.

QUANTUM MERUIT. See Corporations, 12.

QUESTIONS AND ANSWERS. See Appeal and Error, 21, 46.

QUESTIONS FOR JURY. See Bills and Notes, 3; Highways, 11; Criminal Law, 4, 6, 9, 12; Deeds and Conveyances, 3; Evidence, 12, 20; Homicide, 1, 17, 18, 19; Negligence, 2, 13, 19, 24; Carriers, 2; Bailment, 7; Insurance, 19; Arrest and Bail, 2; Banks and Banking, 7.

QUESTIONS OF LAW. See Removal of Causes, 3; Appeal and Error, 23; Negligence, 12, 15.

RAILROADS. See Carriers, 1; Courts, 7; Government, 2; Negligence, 3, 11, 24, 25; Principal and Agent, 1; Master and Servant, 6.

1. *Railroads — Tramroads — Negligence—Contributory Negligence—Damages—Statutes—Master and Servant—Employer and Employee—Fellow-Servant Act.*—A small narrow-gauge road running through the

RAILROADS—*Continued.*

woods and used for the purpose only of transporting logs to the defendant's lumber plant or sawmill, with the cars loaded with logs pulled up a grade by means of a steam skidder, the wire cables, operating around a drum upon the skidder, is a tram or logging road within the intent and meaning of C. S., 3470, amending C. S., 3467, and an employee negligently injured by such company is not barred of his right to recover damages when caused by a fellow-servant; and contributory negligence is only considered in determination of the amount of damages the injured employee has sustained. *Stewart v. Lumber Co.*, 138.

RATIFICATION. See Insurance, 18; Corporations, 5; Release, 1.

REBUTTAL. See Homicide, 4.

RECEIPTS. See Insurance, 5; Contracts, 4.

RECEIVERS. See Banks and Banking, 1, 4; States, 1.

1. *Receivers — Equity — Partnership—Statutes—Remedy at Law—Claim and Delivery—Insolvency.*—Where a partnership assumes to carry out the terms of a written contract to convert logs delivered by the plaintiff at its mills into lumber to be sold exclusively by the plaintiff, the manufactured product to belong to plaintiff, with an agreement for an accounting at stated periods and to arbitrate in the event of disagreement as to the settlements thus to be made: *Held*, the plaintiff has a remedy at law by claim and delivery, C. S., 830, against the defendants, pending litigation without the application of equitable principles, and his application for the appointment of a receiver under the provisions of our statutes should be denied, and especially so when from the facts found it does not distinctly appear on appeal that the defendants were insolvent, though this fact has been found adversely to the appealing defendant. C. S., 860. *Ellington v. Currie*, 610.

2. *Same — Contracts — Constructive Possession—Principal and Agent.*—Where a receivership is sought for a partnership under a contract providing in substance that the defendants have the subject-matter to be delivered exclusively upon the plaintiff's order after manufacturing the same for him, which was delivered by the plaintiff, and the defendants were to manufacture upon a commission basis: *Held*, the defendants hold the constructive possession of the manufactured product on their lands as the plaintiff's agents. C. S., 1208. *Ibid.*

3. *Same—Contracts—Arbitration—Equity.*—Where the ground for the appointment of a receiver in an action against a partnership is the failure of the defendant to account for the payment of commissions alleged to be due the plaintiff, a stipulation in the contract that such disagreement must be referred to arbitration, while not enforceable at law, may be considered by the court with other evidence in passing upon the question as to whether the injunction should be issued. *Ibid.*

RECORDS. See Appeal and Error, 3, 12, 15, 19, 24, 31, 33, 39, 40; Counties, 1; Corporations, 1, 6; Divorce, 1.

1. *Records—Deeds and Conveyances—Index Book—Registration—Mortgages—Liens—Priority of Lien—Statutes.*—The requirements of C. S.,

RECORDS—*Continued.*

3560, as to the indexing of deeds and conveyances by the register of deeds of the proper county, among other things, under the proper initial letters of the surname of the grantors, etc., does not extend to instances where these index books have been provided for the register of deeds with further subdivisions of the letters, alphabetically arranged, and where a mortgage has been registered under its appropriate letter, as the statute requires, it will not lose its priority of lien because not placed under the alphabetical subdivision of the letter. *Clement v. Harrison*, 825.

RECORDER'S COURT. See Courts, 5.

REFERENCE. See Appeal and Error, 7, 20; Arrest and Bail, 1; Damages, 2; Evidence, 28.

1. *Reference—Appeal and Error—Referee's Report—Interpretation—Findings of Fact—Conclusions of Law.*—Whether an item of the report of a referee is a finding of fact or conclusion of law may be determined by the Supreme Court on appeal from an interpretation of his report set out in the record. *Wadford v. Gillette*, 413.

2. *Reference—Trial by Jury—Waiver.*—By not excepting to a compulsory order of reference, and by failing to appear before the referee upon due notification of the hearings, a party waives his right to assert that the reference was not authorized by the statute, and upon the failure to tender issues for the jury upon the findings, the right to a trial by jury is also waived. *Burroughs v. Umstead*, 842.

3. *Reference—Evidence—Appeal and Error—Trial by Jury—Waiver.*—Where there is conflicting evidence, the report of the referee, approved and affirmed by the trial judge upon sufficient evidence, is not reviewable on appeal, when a jury trial has been waived by the conduct of the parties. *Story v. Truitt*, 851.

REFORMATION. See Limitation of Actions, 1.

REFORMATION OF INSTRUMENTS. See Evidence, 18; Judgments, 13.

1. *Reformation of Instruments—Equity—Burden of Proof.*—The burden of proof is on the party seeking to reform a deed absolute upon its face into a mortgage. *Muse v. Hathaway*, 227.

2. *Same—Deeds and Conveyances—Evidence.*—It is necessary for a party seeking to reform a deed absolute upon its face into a mortgage to show facts and circumstances dehors the deed inconsistent with its terms as to entitle him to the relief sought for. *Ibid.*

REGISTER OF DEEDS. See Officers, 1; Records, 1.

REGISTRATION. See Deeds and Conveyances, 4, 20; Mortgages, 4; Sales, 4; Banks and Banking, 9; Records, 1.

REHEARING. See Appeal and Error, 38.

REINSTATEMENT. See Claim and Delivery, 1.

RELEASE. See Actions, 1; Negligence, 19.

1. *Release—Contracts—Negligence — Fraud — Ratification — Rescission — Equity.*—Where a master is liable in damages to its employee for a

RELEASE—*Continued.*

serious injury caused by its negligence, and while the employee is too incapacitated physically and mentally to understand it, obtains a release, upon a reasonably fair consideration to be paid at stated periods, from all liability for damages that may thereafter be claimed, and continues to receive these payments knowingly as paid upon the release after he has had full opportunity to acquaint himself with and understand its terms, he may not thereafter disregard his release though obtained by fraud and overreaching, and maintain an action to recover the actual amount of the damages. *Sherrill v. Little*, 736.

REMAINDERS. See Wills, 4, Estates, 3.

REMAND. See Counties, 2; Appeal and Error, 42; Removal of Causes, 9; Tenants in Common, 2; Judgments, 19.

REMARKS. See Instructions, 13; Criminal Law, 22.

REMEDY AT LAW. See Receivers, 1.

REMOVAL. See Mortgages, 8.

REMOVAL OF CAUSES. See Actions, 7.

1. *Removal of Causes—Federal Courts—Fraudulent Joinder—Separable Controversy—Complaint—Diverse Citizenship.*—Upon the question of whether an action against a nonresident and a resident defendant is severable, and whether the resident defendant was fraudulently joined to oust the statutory jurisdiction of the Federal Court, the matters relating thereto as alleged in the complaint are controlling upon the motion of the nonresident defendant to remove the cause to the Federal Court for diversity of citizenship. *Cox v. Lumber Co.*, 28.

2. *Same—Issues—Jurisdiction.*—If the petition of the nonresident defendant sufficiently alleges that a resident defendant was joined by the plaintiff merely to defeat the jurisdiction of the Federal Court, which is sufficiently controverted by the plaintiff, an issue of fact is raised for the determination of the Federal Court. *Ibid.*

3. *Same—Questions of Law.*—Where a nonresident defendant seeks to remove a cause from the State to the Federal Court for fraudulent joinder of a resident defendant, he must set forth the facts constituting the fraud upon which he relies, and not its mere conclusion of law. *Ibid.*

4. *Same—Master and Servant—Safe Place to Work—Nondelegable Duty of Master.*—Where the complaint alleges facts tending only to show that the tort upon which he rests his action for damages arose from the nondelegable duty of a nonresident master, and that there was no independent act of negligence attributable to the plaintiff's superior, who was joined as a resident defendant, upon the nonresident defendant's proper and sufficient petition and bond for the removal of the cause from the State to the Federal Court for diversity of citizenship, no sufficient ground for a fraudulent joinder to oust the jurisdiction of the Federal Court appears, and the cause will accordingly be ordered removed by the State court. *Ibid.*

5. *Removal of Causes—Federal Court—Jurisdiction—Negligence—Torts—Pleadings—Complaint—Severable Controversy—Parties.*—Where the

REMOVAL OF CAUSES—*Continued.*

amount is jurisdictional and a proper petition and bond has been filed, upon the nonresident defendants' motion to remove the cause from the State to the Federal Court for diversity of citizenship and fraudulent joinder of resident defendants, the complaint filed in good faith will determine the jurisdiction, alleging a joint tort as the basis of the plaintiff's action, when it therefrom appears that the tort alleged is both joint and severable. *Crisp v. Fibre Co.*, 77.

6. *Same—Petitioners—Conclusions as to Fraudulent Joinder.*—Where the complaint in an action brought in the State court alleges a joint tort though the tort is both joint and severable, as the basis of the action against nonresident and resident defendants, and the nonresident has filed a petition in that court to remove it to the Federal Court for fraudulent joinder, to sustain his petition, it is necessary for the petitioner to set forth with particularity such facts as will sustain the conclusion of law therefrom that the joinder of the resident defendant was fraudulent and for the purpose of defeating the jurisdiction of the Federal Court. *Ibid.*

7. *Same—Motive.*—Where the complaint alleges a joint tort against a nonresident and resident defendant, sufficient to retain the cause in the State court, the fact that these allegations were merely for an ulterior bad motive will not alone defeat the jurisdiction of the State court. *Ibid.*

8. *Same—Master and Servant—Nondelegable Duty of Master—Joint Tort.* It is the nondelegable duty of the master to furnish his servant a reasonably safe place to work, and where the complaint has sufficiently set up a good cause of action in this respect, and has further alleged a tort that would make the servant individually liable for the plaintiff's injury arising from the neglect of the master combined therewith, a joint tort is alleged that will defeat the nonresident's motion to remove the cause from the State to the Federal Court on the ground of fraudulent joinder of parties. *Ibid.*

9. *Same—Federal Courts—Motion to Remand.*—Where the petition filed in accordance with the Federal statute taken in connection with the allegations of the complaint raise material issues of fact that go to the substance of the motion to remove for alleged fraudulent joinder of parties, and nothing else appears upon the face of the record that would defeat the petitioner's right, the case is removed instanter, without the jurisdiction of the State court to pass thereon, plaintiff's rights if any he has, being to present the facts controverted in the Federal Court upon his motion therein to remand. *Ibid.*

10. *Removal of Causes—State Court—Jurisdiction—Federal Court—Complaint—Allegations—Joint Tort.*—In an action of an employee against its nonresident employer, operating a lumber road by steam, allegations of the complaint that the death of her intestate was proximately caused by the defendant, and also by the negligence of its resident trainmaster, engineer and conductor by loading the defendant's train, on which the intestate was riding, in the course of his employment too heavily, and that certain of the train's appliances and attachments necessary to its safe operation, were out of order, sufficiently alleges a joint tort, to deny the nonresident defendant's

REMOVAL OF CAUSES—*Continued.*

motion to remove the cause from the State to the Federal Court for the fraudulent joinder of resident defendants' and to retain the cause in the State court. *Queen v. Lumber Co.*, 149.

11. *Removal of Causes—Transfer of Causes—Local Prejudice—Courts—Discretion—Appeal and Error.*—Where a party moves for the removal of a cause to another county than the one in which it had been brought, upon the grounds that he cannot obtain a fair and impartial trial therein, C. S., 471, 472, and upon affidavits filed therein that the case had been generally discussed and that the movant could not proceed therein and obtain an impartial trial, upon which the judge so finds the facts, the order removing the case according to the requirements of the statute is within his sound discretion, and not reviewable on appeal, though he further states in his order that his findings were based on his personal observation. *Gilliken v. Norcom*, 352.

RENEWAL. See Bills and Notes, 4, 7.

RENT. See Highways, 12.

REPEAL. See Appeal and Error, 18; Constitutional Law, 14.

REPORT. See Reference, 1; Evidence, 28.

REPRESENTATION. See Evidence, 15.

REPUGNANCE. See Wills, 6.

REQUESTS. See Instructions, 1, 7, 11.

RES ADJUDICATA. See Drainage Districts, 5, 9; Judgments, 9, 10, 11.

RESALES. See Sales, 1.

RESCISSION. See Release, 1.

RES GESTAE. See Homicide, 21.

RESOLUTIONS. See Corporations, 4, 6.

RESTITUTION. See Contracts, 6, 7.

RESTRAINT. See Habeas Corpus, 3.

RESTRICTIONS. See Deeds and Conveyances, 17, 18.

REVERSAL. See Appeal and Error, 13.

REVIEW. See Appeal and Error, 2, 7, 13, 20.

REVOCATION. See Wills, 10, 12.

REWARDS.

1. *Rewards—Criminal Law—Officers—Sheriffs.*—It is within the power of the Legislature to enact a valid statute giving a reward to those who arrest or cause to be arrested violators of the criminal law, including officers who are paid for making the arrest in pursuit of their duties. *Hutchins v. Comrs. of Granville*, 659.

RIGHTS. See Deeds and Conveyances, 14.

RIGHTS AND REMEDIES. See Judgments, 19.

ROADS AND HIGHWAYS. See Highways.

RULES OF THE ROAD. See Negligence, 6.

RULES OF COURT. See Appeal and Error, 16, 22; Courts, 6.

RULE IN SHELLEY'S CASE. See Wills, 4; Estates, 4, 6.

SAFE INSTRUMENTALITIES. See Master and Servant, 1.

SAFE PLACE TO WORK. See Removal of Causes, 4; Negligence, 10, 17, 27.

SALES. See Banks and Banking, 3, 10; Corporations, 11; Mortgages, 2, 5; Trusts, 1; Wills, 3, 19; Instructions, 9.

1. *Sales—Mortgages—Raised Bids—Clerks of Court—Resales—Statutes—Deeds and Conveyances.*—Under the express provisions of C. S., 2591, the amount of the raise of the bid on lands sold under a mortgage must be paid to the clerk of the Superior Court of the county within ten days from the time of the foreclosure sale; and where the same has been erroneously paid to the mortgagee or trustee within the time specified, it is insufficient, and the purchaser at the foreclosure sale is entitled to his deed upon the payment of the purchase price. *Newby v. Gallop*, 244.

2. *Same—Interveners—Mortgagors.*—Where a raised bid of the price brought at a foreclosure sale of land under mortgage has not been made as required by statute, the mortgagors are properly denied the right of intervening on the ground that they had been misled by the payment required by the statute to be made to the clerk of the court having been made to the mortgagee. *Ibid.*

3. *Sales—Execution—Homestead — Excess — Judgments—Evidence—Statutes.*—Where the controversy in the action is made to depend upon the issue arising from the pleadings and evidence introduced upon the trial between the purchaser at an execution sale and the heir at law of the judgment debtor, as to whether the homestead allotted in the action embraced the home tract of the deceased, or whether it included an adjoining tract of land of the deceased judgment debtor, the original return of the appearance, or copy thereof on file in the proceedings, to lay off the homestead found in the judgment will control, and the further proceedings in the matter are competent evidence, without the necessity of registration. C. S., 731. *Carstarphen v. Carstarphen*, 541.

4. *Sales—Conditional Sales—Chattel Mortgages — Registration — Liens—Mortgages.*—Where the vendor retains title upon a chattel sold and delivered for the payment of the balance of the purchase price to be divested, and the property to become that of the purchaser upon his payment thereof at a time specified, it is a sale upon condition in the nature of a chattel mortgage requiring registration in respect to its priority of lien over chattel mortgages subsequently given to others upon the same property and registered in the proper county. C. S, 3312. *Trust Co. v. Motor Co.*, 663.

SALES—*Continued.*

5. *Same—Bills and Notes—Drafts—Order, Notify.*—Where a seller of automobiles under a contract retaining title until the balance of the purchase price shall have been paid, ships the goods to its own order, notify the consignee and attaches it to a draft on the purchaser for the initial payment, a bank lending the required amount to make this payment secured by a chattel mortgage duly registered on the machines with which the draft was paid and delivery made by the carrier to the consignee, upon presentation of the bill of lading, has priority of lien over that of the seller under his unregistered contract of sale. *Ibid.*

SCHOOLS. See Taxation, 1; Eminent Domain, 4.

SCHOOLS AND SCHOOL DISTRICTS. See Education, 1.

SELECTION OF SERVANTS. See Master and Servant, 2.

SELF-DEFENSE. See Homicide, 1, 18, 20.

SEPARABLE CONTROVERSY. See Removal of Causes, 1, 5.

SET-OFF. See Municipal Corporations, 1; Banks and Banking, 8; Bills and Notes, 11.

SETTLEMENT OF CASE. See Appeal and Error, 16, 41.

SEVERANCE. See Actions, 3.

SHAREHOLDERS. See Corporations, 9; Banks and Banking, 1.

SHERIFFS. See Attachment, 1; Execution, 1; Rewards, 1.

SIGNATURE OF JUDGE. See Appeal and Error, 40, 41.

SIGNS. See Highways, 10.

SOLICITORS. See Criminal Law, 2.

SPEED. See Negligence, 2.

STATE COURTS. See Removal of Causes, 10.

STATE HIGHWAY. See Highways, 10.

STATE HIGHWAY COMMISSION. See Highways, 1, 5, 6, 8; Statutes, 1.

STATES. See Actions, 4; Debtor and Creditor, 2.

1. *States — Government — Sovereign Powers — Prerogative — Statutes — Banks — Receivers — Depositors — Debtor and Creditor—Priority of State's Claim.*—The English common law, giving a debt due to the sovereign a preference to the debts due to others, is abrogated by our statute, and is not in force in North Carolina, as applied to a debt due to the State. C. S., 970. *Corporation Commission v. Trust Co.; Deposit Co. v. Poisson*, 513.

2. *Same—Principal and Surety—Indemnity Bonds—Equity—Subrogation.* Where the State Treasurer has money on deposit in a bank that has since become insolvent, and in a receiver's hands, and the State has transferred all of its rights to a surety on an indemnity bond the Treasurer has required from the bank, the surety, on paying the

STATES—*Continued.*

State deposit to the Treasurer, cannot acquire by subrogation a priority of payment over the general depositors or creditors of the defunct bank, as no such right existed in the favor of the sovereign State, especially, as in this case, the State Treasurer had not asserted it before the appointment of the receiver. *Ibid.*

STATE TREASURER. See Bailment, 3.

STATUS QUO. See Contracts, 6.

STATUTES. See Actions, 1, 3, 4, 6, 10, 12; States, 1; Attachment, 1; Clerks of Court, 1; Bailment, 3; Bills and Notes, 1; Constitutional Law, 1, 3, 8, 13, 14; Criminal Law, 3, 6, 15, 17; Dedication, 1; Deeds and Conveyances, 4, 6, 13, 14, 20, 21; Drainage Districts, 2, 8, 10, 11, 12; Escape, 3; Evidence, 4, 28; Highways, 1, 2, 3; Husband and Wife, 1, 3; Judgments, 6, 8, 16; Limitation of Actions, 1; Municipal Corporations, 2, 3, 6, 7, 9; Negligence, 2, 4, 6, 12; Railroads, 1; Sales, 1, 3; Taxation, 1; Appeal and Error, 18, 22, 39; Education, 1; Instructions, 7, 11, 13; Parent and Child, 1, 2; Usury, 2; Wills, 8, 9, 10, 11, 12, 19; Divorce, 1; Debtor and Creditor, 2; Demurrer, 1; Homestead, 1; Courts, 8; Pleadings, 5, 6; Tenants in Common, 2; Mortgages, 7; Receivers, 1; Intoxicating Liquor, 1; Master and Servant, 6; Records, 1.

1. *Statutes — Roads and Highways — State Highway Commission—Presumption—Prospective Effect—Presenting Claims.*—3 C. S., 3846(v), making void a claim for material furnished the contractor for the building of a State highway, unless the claimant has presented it in writing, etc., to the State Highway Commission within six months after the completion of the work, and making such failure a bar to the claimant's right to recover, falls within the rule of presumption that the effect of the statute is to be prospective only, in the absence of an expressed or clearly implied intent to the contrary. *Overman v. Casualty Co.*, 86.

2. *Same.*—And where the contract between the contractor and the State Highway Commission specified that payment thereunder shall be due at a certain time, the statute has no application if its operative effect is fixed therein for a later date. *Ibid.*

3. *Statutes—State Policy—Convicts—Punishment—Constitutional Law.*—The policy of the State involving the power of the Legislature to authorize corporal punishment to be administered to refractory or unruly convicts sentenced to work on the county roads, is for the Legislature to determine, and whether there is any constitutional restraint thereon, is a matter for the courts to decide. *S. v. Revis*, 192.

4. *Statutes—Condemnation.*—The statutory authority given the county board of education to condemn land for school purposes is in derogation of a common-law right, and its terms will be strictly construed as to the extent or limit of the power given. *Board of Education v. Forrest*, 519.

STATUTE OF FRAUDS. See Contracts, 10.

STATUTE OF LIMITATIONS. See Actions, 12; Limitation of Actions.

STIPULATIONS. See Insurance, 7, 15; Corporations, 11.

STOCK. See Corporations, 9; Banks and Banking, 9, 10.

STOCKHOLDERS. See Banks and Banking, 1; Corporations, 9.

STORAGE. See Bailment, 3.

STREET RAILROADS. See Negligence, 1.

STREETS AND SIDEWALKS. See Municipal Corporations, 1, 3, 5; Deeds and Conveyances, 1.

SUBROGATION. See Insurance, 11; States, 2; Officers, 3.

SUITS. See Municipal Corporations, 8.

SUMMONS. See Courts, 9.

SUPERIOR COURTS. See Courts, 1.

SUPERVISION AND INSPECTION. See Municipal Corporations, 5, 6, 10; Negligence.

SUPREME COURT. See Appeal and Error, 31.

SURPLUS. See Corporations, 2.

TAXATION. See Constitutional Law, 9, 10; Municipal Corporations, 8, 9.

1. *Taxation — Schools — Back Taxes — Statutes—Constitutional Law.*—A city without legislative authority may not levy a back tax to reimburse itself for moneys it has paid on the interest of its bonded debt, on a part of the district that has escaped taxation by reason of inadvertence or error of the proper authorities in listing the property of the owners for that purpose, and an ordinance to that effect is void as inhibited by the State Constitution and statute requiring that taxes shall be uniform and *ad valorem*. Const., Art. VII, sec. 9; C. S., 2678. *Whitley v. Washington*, 240.

TELEGRAPHS AND TELEPHONES. See Evidence, 15.

1. *Tenants in Common—Voluntary Division—Deeds and Conveyances—Joinder of Wife—Dower—Estoppel.*—The voluntary division of lands by tenants in common creates no new estate in the lands, but only apportions the land by their interchangeable deeds that each was compellable to take under a division by court process; and where the division so made is fair and equitable, it is unnecessary for their wives to join in the conveyance to estop them from claiming their interests therein. *Valentine v. Granite Corporation*, 578.

2. *Same—Case Agreed—Statutes—Appeal and Error—Facts—Remand.*—Where a controversy, properly constituted, is submitted without action, C. S., 626, involves the question as to the necessity of the wife of a tenant in common to join in his deed voluntarily given to divide the lands between himself and the other tenants in common, on appeal the case will be remanded if it does not appear in the facts agreed that the division so made was a fair and equitable one. *Ibid.*

TENDER. See Mortgages, 8.

1. *Tender—Payment—Checks—Insurance, Accident.*—A check given by the insurer to the insured in payment for an acknowledged liability, as to a part of its liability is not a legal tender to support a plea of payment. *Clark v. Ins. Co.*, 166.

TERMS. See Officers, 1.

TERMS OF COURT. See Judgments, 18.

TIMBER. See Mortgages, 8.

TIME. See Actions, 2; Eminent Domain, 2; Appeal and Error, 16.

TITLE. See Evidence, 1, 3, 4, 5; Deeds and Conveyances, 8, 16; Mortgages, 8.

TORTS. See Removal of Causes, 5; Judgments, 16.

TRAMROADS. See Railroads, 1.

TRANSACTIONS AND COMMUNICATIONS. See Wills, 11.

TRANSFERS. See Removal of Causes, 11.

TRANSFERS OF SHARES. See Banks and Banking, 9, 12.

TRANSPORTATION. See Education, 1.

TREASURERS. See Officers, 2.

TRIALS. See Appeal and Error, 4; Evidence, 6, 26; Judgments, 18.

1. *Trial by Jury—Agreement by Parties—Waiver—Evidence—Appeal and Error—Constitutional Law.*—Where the parties to an action agree that the trial judge find the facts, they thereby waive a trial by jury, and the facts so found by him upon supporting evidence are conclusive on appeal. *Harrison v. New Bern*, 555.

TRIAL BY JURY. See Constitutional Law, 13; Reference, 2, 3.

TRUST DEEDS. See Mortgages, 6.

TRUSTEE. See Usury, 1; Mortgages, 6; Wills, 13.

TRUSTS. See Wills, 1, 3, 13, 15, 19; Estates, 1; Husband and Wife, 2; Corporations, 11; Mortgages, 5, 6; Banks and Banking, 4, 5, 6.

1. *Trusts—Mortgages—Sales—Parol Trusts.*—Where the mortgagor of lands has afterwards become a bankrupt and the trustee therein has disclaimed title to the property, owing to the excessive amount of the debt it secured, and the successful bidder at the foreclosure sale has agreed with the mortgagor that he would bid in the mortgaged lands for him upon condition that the mortgagee pay the amount of the mortgage to him: *Held*, upon performance of the condition the title to the property vests in the mortgagor as agreed by parol, though the title to a part of the lands was defective as when the purchaser at the sale made the agreement with knowledge thereof. *Weaver v. Norman*, 254.

UNIFORMITY. See Constitutional Law, 10.

USE. See Attachment, 2.

USES. See Wills, 6.

USURY.

1. *Usury—Actions—Parties—Bankruptcy—Trustee.*—A right of action to recover the penalty for a usury charge is in the nature of an action

USURY—*Continued.*

for debt, and is a wrongful detention of, or injury to the estate of the bankrupt which passes to his trustee in bankruptcy. C. S., 2306. *Ripple v. Mortgage Corp.*, 422.

2. *Usury — Contracts — Interpretation — Substance—Statutes.*— Where a finance corporation loans money for the purchase of automobiles sold in this State to be paid for herein at a greater rate of interest than six per cent, the transaction is an usurious one coming within the inhibition of our statute and the penalty it imposes, though the contract is couched in the language of bargain and sale in order to evade our usury law. C. S., 2305. *Ibid.*

3. *Same—Place of Payment.*—Where in fact a contract for the payment of usurious interest in violation of C. S., 2305, was made and payable in this State, the fact that it appeared from the face of the contract that it was payable in another state, does not relieve it of its usurious charge of interest contrary to the statute of this State. *Ibid.*

VALUE. See Actions, 2; Damages.

VENDOR AND PURCHASER. See Banks and Banking, 10.

VERDICT. See Bills and Notes, 7; Appeal and Error, 44; Homicide, 3, 13; Judgments, 16; Negligence, 16; Criminal Law, 21.

VESTED RIGHTS. See Drainage Districts, 7; Insurance, 1; Estates, 5; Constitutional Law, 15; Wills, 18.

VETERANS. See Constitutional Law, 9.

VICE PRINCIPAL. See Master and Servant, 4, 5.

VIOLATION OF STATUTES. See Negligence, 4.

WAGES. See Master and Servant, 2.

WAIVER. See Insurance, 10, 12, 14; Trials, 1; Evidence, 24; Contracts, 15; Reference, 2, 3.

WAR. See Courts, 7; Government, 2; Judgments, 9; Constitutional Law, 9.

WAREHOUSEMAN. Bee Bailment, 2, 3, 4, 6.

WARNINGS. See Negligence, 24.

WARRANT. See Criminal Law, 7.

WILLS. See Deeds and Conveyances, 5; Estates, 6; Judgments, 2; Contracts, 3; Parent and Child, 1, 2.

1. *Wills — Trusts — Executors and Administrators — Courts — Actions.*— Where trusts are imposed by will upon an executor and involve the construction of certain portions of a will, the executor may apply to the courts in their equitable jurisdiction for advice in the proper administration of the trusts. *Bank v. Edwards*, 118.

2. *Wills—Intent—Interpretation.*—The entire will in its related parts will be construed as a whole to effectuate the testator's intention in the disposition of his property. *Ibid.*

WILLS—*Continued.*

3. *Same — Trusts — Powers of Sale — "Home Place"—Unimproved Non-income Yielding Lots—Deeds and Conveyances.*—Where a will expressly confers upon the executor and trustee therein named the right to sell the assets of the estate, reinvest the proceeds, etc., and expressly excludes from this power "income-yielding real estate": *Held*, the words excluding such real estate will not apply to non-income producing lands such as a devise to the widow of the home place on which there are one or more unproductive lots, and the executor and the widow may sell the vacant lots and convey a good title. *Ibid.*

4. *Wills—Devise—Rule in Shelley's Case—Remainders.*—A devise to the sisters of the testator and their heirs forever, if any, if not to the heirs of certain other of the testator's sisters, to them and their assigns, forever, does not create a remainder or the semblance of a remainder, and is not within the rule in *Shelley's case. Daniel v. Bass*, 294.

5. *Same—"Heirs"—Interpretation.*—In a devise to a specified sister and brother of the testator's lands to them and their heirs forever, if any, if not to the heirs of certain other of the testator's brothers and sisters, the word "heirs" unexplained by other expressions of the will is to be construed in its technical sense as heirs who take as if by descent under the canons general, and not that of children, carrying the fee-simple title to the brother and sisters first named. *Ibid.*

6. *Wills — Estates — Contingent and Springing Uses—Repugnance—Fee Limited After a Fee.*—While under C. S., 1740, under the doctrine of contingent and springing uses (27 Henry VIII), a fee may be limited after a fee by devise of lands, there must have been created a supervening contingent event which may shorten the continuation of the estate granted in fee, and upon which the uses may operate, and otherwise a fee limited after a fee is repugnant and the limitation is void. *Ibid.*

7. *Wills—Devise—Election—Estoppel.*—One claiming lands under a will is put to his election to take the tract described in the will, and is estopped from claiming independently a part of the lands devised to another beneficiary. *Craven v. Caviness*, 311.

8. *Wills—Holograph Wills—Animo Testandi—Statutes.*—For a memorandum written and signed by the testator to take effect as his will, it must, among other requisites, show that it was made *animo testandi*, and where the other formalities have been observed, a "pack" or slips of paper pinned to a note in his favor, with the endorsement written thereon, and signed by him, a long time prior to his death, "I want S. W. have this pack," will not operate either as a valid holograph will or codicil. C. S., 4131. *In re Perry*, 397.

9. *Wills—Parent and Child—After-born Child—Statutes—Insurance, Life.* Where a child is born after the father has made a will, and no provision for the child is therein made, the mere fact that the father insured his life for the benefit of the child is insufficient to show the purpose of the testator to make provision in this way for the after-born child, and the latter will share in the estate of his father under the provisions of our statute, C. S., 4169. *Sorrell v. Sorrell*, 439.

WILLS—*Continued.*

10. *Wills—Parent and Child—After-born Child—Adoption of Child—Revocation—Statutes.*—The subsequent birth of a child or the adoption of one under our statute, does not revoke the will of the father, C. S., 4135, as in case of subsequent marriage, C. S., 4134. *Ibid.*

11. *Wills — Deceased Persons — Transactions and Communications—Evidence—Statutes.*—The facts that upon the trial of a caveat to a holograph will the testatrix had placed the paper-writing in a tin box in her trunk, with her other valuable papers and effects, enumerating them; that the deceased carried the keys of the trunk, and these keys were given the witness, a beneficiary under the will, by some of the "women folks" when testatrix died, etc., are of transactions within the personal knowledge of the witness, and evidence thereof is not forbidden by our statute, excluding personal communications and transactions with deceased persons. *In re Foy*, 494.

12. *Wills—Revocation—Gifts—Statutes.*—A bequest of personal property in a trunk which contained the holograph will and other valuable papers of the deceased, after removing certain articles specifically bequeathed to others, is not a revocation of her will by the testatrix. C. S., 4133, *et seq.* *Ibid.*

13. *Wills—Executors and Administrators—Powers—Trusts—Bad Faith of Trustee.*—Where it clearly appears to be the intent of the testator in the construction of his will that a certain income from his estate held in trust is to be equitably apportioned between his widow and his grandson, in accordance with the judgment of the former to whom the executor and trustee is to make payment, it is required of the widow that she exercise the power in accordance with the testator's intent, and her refusing to pay anything whatsoever to the grandson out of the funds she so receives, is bad faith and a breach of the trust imposed on her, which gives the court of equity jurisdiction and power to interfere and fairly make the apportionment between them. *Carter v. Young*, 678.

14. *Same—Pleadings—Demurrer.*—Where the complaint sufficiently alleges the complete breach of a special trust of a devisee in failing to pay over to another legatee his just proportion of moneys paid over by the executor and trustee under a will providing the total income should be paid to the special trustee giving her the power to make the apportionment between herself and the testator's grandson: *Held*, a demurrer is bad when resting upon the ground that the courts had no authority to interfere with her in the exercise of the power thus given her under the terms of the will. *Ibid.*

15. *Wills—Devise—Charitable Uses—Trusts.*—A devise of farm lands to the trustees of a religious congregation to be used as a pastor's home, with provision for the perpetual care of the testator's grave, is a good devise for a charitable use and enforceable to effectuate the testator's intent. *Holton v. Elliott*, 708.

16. *Same—Courts—Jurisdiction—Equity—Conversion—Deeds and Conveyances.*—Where a devise of lands to the trustees of a religious congregation under changed conditions has become ineffectual to carry out the purpose of the testator in providing a home for its pastor, or to carry out the condition annexed thereto, our courts have equitable

WILLS—*Continued.*

jurisdiction to order a sale of the lands and the reinvestment of the proceeds in a home suitable for the purpose, and the reinvestment of the remainder of the proceeds of the sale to perform the conditions upon which the home was devised and accepted. *Ibid.*

17. *Wills—Codicils—Intent of Testator—Interpretation.*—A codicil will be construed in its relation to the will to give effect to the intention of the testator as to changes made in the latter, and in this respect the will and the codicil will be construed together. *Bolling v. Barbee,* 787.

18. *Same—Estates—Contingent Remainders—Vested Interests.*—A devise of lands to testator's wife for life, or until she may remarry, with limitation over to testator's named daughters, also for life or until marriage, with further limitation over that the lands be then divided among all the testator's children that may be living at the falling in of the particular estate, creates a contingent remainder in the ulterior takers, the children of the testator living to take effect at the time of the falling in of the precedent estates; but where, by codicil, the testator provides for a division equally among all of his children without indicating otherwise: *Held,* the codicil will be construed as an amended intention "of the testator, and any child living at the death of the testator will take a vested interest in the lands so devised, subject to the extent of such interest which may be disposed of by will or deed. *Ibid.*

19. *Wills — Trusts — Contingent Interests — Sales — Statutes—Powers of Sale—Estates—Contingent Remainders.*—Where specific lands are devised for the contingent use of persons *in esse* and *in fuisse,* and sold in proceedings for partition, reserving the interests of all by reinvestment for the then unascertainable devisees under the provisions of our statute, see *Springs v. Scott,* 132 N. C., 548, and cases approving the decision, and also under a duly exercised power conferring upon the trustee or executor, see *Mewborn v. Moseley,* 177 N. C., 110, and case approving this decision, the purchaser in either event gets a good title. *Powell v. Timber Corp.,* 794.

WITHDRAWAL. See Dedication, 1.

WITNESSES. See Evidence, 7, 10, 27.

WRITTEN INSTRUMENTS. See Contracts, 1, 10; Evidence, 21.

WRONGFUL DEATH. See Actions, 12.